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International Law and Non-State Armed Groups: A legal Analysis of Kurdish Revolts

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“... there are no authentic nations: nationhood is a consequence of political and ideological struggle”¹.

¹ M. Koskenniemi, ‘National Self-Determination Today: Problems of Legal Theory and Practice’ (1994) 43 *ICLQ*, p. 241.

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Table of contents

International Law and Non-State Armed Groups: A legal Analysis of Kurdish Revolts .1

ACKNOWLEDGEMENTS	3
TABLE OF CONTENTS	4
LIST OF ABBREVIATIONS	10
CHAPTER 1. INTRODUCTION	13
1.1 Non-State Armed Groups: a working definition	14
1.2 The three Kurdish entities of Iran, Iraq and Turkey	20
1.3 Methodology of the thesis	21
1.4 Classification of armed conflict in Kurdistan	22
1.4.1 International armed conflict	22
1.4.2 Internal armed conflict	24
1.4.3 Internationalized armed conflict	27
CHAPTER 2. THE KURDS: AN HISTORICAL BACKGROUND	29
2.1 The land of the Kurds	29
2.1.1 The Kurds: a divided people	29
2.1.2 Division of Kurdistan	33
2.1.3 The roots of Kurdish nationalism	34
2.2 The Kurds, international law and the formation of the modern Middle East	40
2.2.1 A struggle for dominance: the Treaty of <i>Sèvres</i>	40
2.2.2 Treaty of Lausanne (1923): Creation of modern Turkey and Iraq	42
2.2.3 The Permanent Court of International Justice and the Vilayet of Mosul	45
2.3 The Kurds in Turkey: 1923-1945	47
2.3.1 Living under the Kemalist regime	47
2.3.2 Legal measures against the Kurds in Turkey	49
2.3.3 The major Kurdish revolts in Turkey	52
2.3.3.1 SHEIKH SAID REVOLT, 1925	53

2.3.3.2	ARARAT REVOLT, 1927-1930	55
2.3.3.3	THE DERSIM REVOLT OF 1937	58
2.4	The Kurds in Iraq: 1923-1945	60
2.4.1	Iraq: a British creation	60
2.4.2	The false promise of self-rule.....	62
2.4.3	The establishment of monarchy: the nascent Arab state	63
2.4.3.1	KURDISH REVOLTS IN IRAQ.....	66
2.4.3.2	SHEIKH MAHMUD'S REVOLTS.....	67
2.4.3.3	THE EMERGENCE OF MULLAH MUSTAFA BARZANI	69
2.5	The Kurds in Iran.....	70
2.5.1	The end of the Qajar Dynasty	70
2.5.2	Reza Shah and Iranian nationalism	72
2.5.3	Simko's revolts.....	73
2.6	The Kurdish Mahabad Republic of 1946	75
2.7	A United front against the Kurds: Treaty of <i>Saadabad</i> of 1937	78
2.8	Kurdistan 1946-1991	79
2.8.1	After the Mahabad Republic and emergence of Kurdish political parties.....	79
2.8.2	The Kurds in Iran: the post 1946 era.....	80
2.8.3	Armed revolts against the Shah's regime.....	82
2.8.4	The establishment of the Islamic Republic: a false dawn	84
2.8.5	State terrorism: assassinations of Kurdish leaders in Europe	89
2.9	The Kurds in Iraq: the Post-1946 Era.....	91
2.9.1	The End of monarchy and the war of 1961.....	91
2.9.2	First Barzani revolt 1961-70	92
2.9.3	The Second Barzani revolt of 1974-75	96
2.9.4	The Algiers agreement of 1975	98
2.9.5	The emergence of the Patriotic Union of Kurdistan (PUK).....	99

2.9.6	The Anfal campaign: the genocide of the Kurds.....	101
2.9.7	The Gulf War 1990-91: the establishment of a safe haven	103
2.10	The Kurds in Turkey: the Post-1946 Era.....	109
2.10.1	Repression of the Kurdish population in 1950s & 1960s	109
2.10.2	The 1980 military Coup d'état in Turkey.....	112
2.10.3	The emergence of the Kurdistan Workers' Party (PKK)	113
2.10.3.1	POLITICAL AND MILITARY STRUCTURE OF THE PKK.....	116
2.10.3.2	PKK'S REVOLT OF 1984	118
2.10.3.3	THE CAPTURE OF ABDULLAH OCALAN	123
2.10.3.4	THE UNION OF COMMUNITIES IN KURDISTAN (KCK).....	126
2.11	Party for a Free Life of Kurdistan (PJAK)	128
CHAPTER 3 MODERN INTERNATIONAL LAW, THE KURDS AND SELF-DETERMINATION.....		131
3.1	Introduction	131
3.2	The rise of non-state actors in the post-1945 era.....	136
3.3	The rise of NSAGs globally, guerrilla warfare and international law	138
3.4	NSAGs, the Cold War & proxy wars	140
3.5	The classical approach to NSAGs & armed conflict in international law	141
3.5.1	The legal development	141
3.5.2	The three tier hierarchy	147
3.5.2.1	NON-APPLICATION OF THE LAWS OF WAR TO SITUATIONS OF REBELLION ..	147
3.5.2.2	THE CONCEPT OF INSURGENCY	148
3.5.2.3	THE RECOGNITION OF BELLIGERENCY.....	150
3.5.2.4	STATE PRACTICE AND RECOGNITION OF BELLIGERENCY	152
3.6	Humanization of the law of war: a modern approach	155
3.7	Article 3 Common to the four Geneva Conventions of 1949.....	159
3.7.1	The drafting history of Common Article 3	159

3.7.2	The substitution of ‘armed conflict’ for ‘war’	160
3.7.3	The intended scope of Common Article 3	161
3.7.4	The binding nature of Common Article 3 upon states & NSAGs.....	163
3.7.5	State practice related to Common Article 3	166
3.8	1977 Additional Protocols I & II to the Geneva Conventions of 1949	169
3.8.1	Additional Protocol I of 1977.....	170
3.8.1.1	THE EMERGENCE OF NATIONAL LIBERATION MOVEMENTS	170
3.8.1.2	CUSTOMARY STATUS OF WARS OF NATIONAL LIBERATION	172
3.8.1.3	DRAFTING HISTORY OF ARTICLE 1(4) OF ADDITIONAL PROTOCOL I.....	174
3.8.1.4	SCOPE OF APPLICATION OF ARTICLE 1(4) OF ADDITIONAL PROTOCOL I	176
3.8.1.5	PROVISIONS FOR APPLICATION: ARTICLE 96 (3)	178
3.8.1.6	STATE PRACTICE RELATED TO ARTICLE 1(4)	182
3.8.2	Additional Protocol II of 1977	183
3.8.2.1	THE DRAFTING HISTORY OF ADDITIONAL PROTOCOL II.....	183
3.8.2.2	THE INTENDED SCOPE OF ADDITIONAL PROTOCOL II.....	185
3.8.2.3	THE THRESHOLD FOR THE APPLICATION OF ADDITIONAL PROTOCOL II.....	187
3.8.2.4	THE BINDING NATURE OF ADDITIONAL PROTOCOL II	187
3.8.2.5	STATE PRACTICE RELATED TO ADDITIONAL PROTOCOL II.....	189
3.9	NSAGs: armed conflict reclassified?	190
3.9.1	THE BIFURCATED LEGAL DISTINCTION.....	191
3.9.2	INTERNAL DISTURBANCE AND IENSIONS	192
3.9.3	NSAGs AND DEFINING ARMED CONFLICT.....	195
3.10	The importance of customary law	198
3.11	Common Article 3 as a basis for compliance	204
CHAPTER 4 INTERNATIONAL LAW APPLICABLE TO NSAGS		209
4.1	The legal status of NSAGs	209
4.2	International legal obligations of NSAGs under inter-state treaty law	212

4.3 International criminal law	215
4.3.1 The nexus between war crime and armed conflict	216
4.3.2 The Statute of the International Criminal Court (ICC)	220
4.3.3 NSAGs, War crimes and international law	222
4.4 NSAGs, battlefield status and regulation of force	225
4.4.1 Combatants in international law	225
4.4.2 Combatants in non-international law	229
4.4.3 Civilians	232
4.4.3 Direct participation in hostilities	233
4.5 Detention under international law	238
4.5.1 Prisoners of war status in international law	238
4.5.2 Prisoners of war status in non-international armed conflict.....	240
4.6 International human rights law (IHRL) in armed conflict.....	243
4.6.1 Relevance of IHRL	243
4.6.2 The relationship between IHL and IHRL.....	244
4.6.3 The relevance of soft law (the protection of civilians).....	249
4.6.4 Minimum humanitarian standard applicable to any armed conflict.....	253
4.7 NSAGs and terrorism	257
4.7.1 Introduction.....	257
4.7.2 Terrorist v. freedom fighter	259
4.7.3 Lack of a universal definition of terrorism in international law	263
4.7.4 Treaty law related to terrorism	264
4.7.5 The end of the Cold War	267
4.7.6 After 11 September 2001 attacks	268
5.7.7 Terrorism in IHL: a specific context & meaning.....	270
4.8 IHRL and counter-terrorism measures	275
4.8.1 States of emergency and anti-terrorism.....	276

4.8.2	The scope of the notion of state of emergency.....	277
4.8.3	The proportionality of derogation	280
4.8.4	Non-derogable rights.....	282
4.8.5	Other international obligations.....	283
4.9	Legality of use of force against NSAGs	285
4.9.1	Introduction.....	285
4.9.2	Background to Turkey’s cross-border operations	288
4.9.3	Background to Iran’s cross-border operations.....	291
4.9.4	The prohibition of use of force by NSAGs in international law	293
4.9.5	The right to self-defence: procedural obligations	294
4.9.6	The customary law requirement of necessity and proportionality	298
4.9.7	The practice of states and the level of state support.....	303
4.9.8	State responsibility	308
4.9.9	Can NSAGs instigate an armed attack?	310
4.9.10	Self-defence against armed attacks by NSAGs after the September 11	316
CONCLUSION		320
BIBLIOGRAPHY		331

List of Abbreviations

AJIL	American Journal of International Law
AKP	Justice and Development Party
Am U L Rev	American University Law Review
ARGK	Peoples' Liberation Army of Kurdistan
ASIL	American Society of International Law
BDP	Kurdish Peace and Democracy Party
Brooklyn JIL	Brooklyn Journal of International Law
BYIL	British Yearbook of International Law
Cardozo JICL	Cardozo Journal of International and Comparative Law
Chin JIL	Chinese Journal of International Law
CIA	Central Intelligence Agency
Columbia JTL	Columbia Journal of Transnational Law
Cornell ILJ	Cornell International Law Journal
ECHR	European Convention on Human Rights
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
ERNK	Liberation Front of Kurdistan
EU	European Union
KDP	Kurdish Democratic Party (Iraq)
KDP-I	Kurdish Democratic Party of (Iran)
GC	Geneva Conventions
Harv. ILJ	Harvard International Law Journal
HRQ	Human Rights Quarterly
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Project
ICJ	International Court of Justice
ICLQ	International Comparative Law Quarterly
ICRC	International Committee Red Cross

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILA	International Law Association
ILR	International Law Reports
ILM	International Legal Materials
ILSA	International Law Students Association
Indian JIL	Indian Journal of International Law
IRGC	Islamic Revolutionary Guard Corps
IRRC	International Review of Red Cross
GA	General Assembly
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law Quarterly
Hum Rts Q	Human Rights Quarterly
JCSL	Journal of Conflict and Security Law
JICJ	Journal of International Criminal Justice
KADEK	Kurdish Freedom and Democracy Congress
KCK	Union of Communities in Kurdistan
KONGRA-GEL	Kurdish People's Congress KONGRA-GEL
KRG	Kurdish Regional Government
LJIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
LQR	Law Quarterly Review
Melb. JIL	Melbourne Journal of International Law
MERIP	Middle East Research and Information Project
Mich. JIL	Michigan Journal of International Law
Mich. L Rev	Michigan Law Review
Nashville BJ	Nashville Bar Journal
NCRI	National Council of Resistance of Iran
NATO	North Atlantic Treaty Organization
NCRI	National Council of Resistance of Iran
NSC	National Security Council (Turkey)
NILR	Netherlands International Law Review

NGO	Non-governmental organization
NLM	National Liberation Movement
NSAG	Non-State Armed Group
OHAL	State of Emergency Legislation (Turkey)
OSCE	Organization for Security and Cooperation in Europe
Oxford JLS	Oxford Journal of Legal Studies
PJAK	Party for a Free Life of Kurdistan
PLO	Palestinian Liberation Organization
PKK	Kurdish Workers' Party
PMOI	People's Mujahidin Organization of Iran
PUK	Patriotic Union of Kurdistan (Iraq)
San Diego ILJ	San Diego International Law Journal
SAVAK	Organization of Intelligence and National Security (Iran)
SIPRI	Stockholm International Peace Research Institute
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNITA	National Union for the Total Independence of Angola
UNTS	United Nations Treaty Series
Vir. JIL	Virginia Journal of International Law
Wash. L Rev	Washington Law Review
Yale JIL	Yale Journal of International Law
YIHL	Yearbook of International Humanitarian Law

Chapter 1. Introduction

Traditionally, international law was the relations between sovereign states and since 1648 treaties of Westphalia the world has been divided between sovereign states.² The concept of sovereignty is central to international law and refers to a sealed territorial space within which there is supreme authority for governance.³ In other words, in the international system sovereignty is manifest in the state.⁴ In a neat theoretical classical world, however, there were no provisions for non-state actors such as non-state armed groups (NSAGs).⁵ In order to understand the concept of non-state actors (particularly as in the case of NSAGs) it would be useful to define statehood according to international law.⁶ The classical criteria of statehood (*ex factis jus oritur*) was adopted in Article 1 of the Montevideo Convention on Rights and Duties of States (1933), which lays down four characteristics that an entity should possess to be considered a state, namely; (i) a permanent population; (ii) stable boundaries or a defined territory; (iii) under a functioning government; and (iv) engage or having the capacity to engage in formal relations with other states.⁷ Additionally, the notion of a state actor could be extended to organizations or individuals directly connected and responsible to that state.⁸ On the abovementioned Convention Brownlie states: ‘this brief enumeration of criteria is often adopted in substance by jurists, but it is no more than a basis for further investigation.’⁹ Harris is of the opinion that the Montevideo Convention merely codified existing legal norms and its principles as well as restatement of customary international law which does not only apply to signatories but to all subjects of international law.¹⁰ Nevertheless, recognition by

² H. Kelsen, ‘Principles of International Law’, Rinehart & Co., 1st ed., 1952, pp. 18-19.

³ D. Philpott, ‘Revolution in Sovereignty: How Ideas Shaped Modern International Relations’, Princeton U.P., 2001, p. 254.

⁴ Sovereignty has been described as central to the modern international law associated with a particular bundle of characteristic: a defined territory, recognition by other sovereign states, exclusive authority within a defined territory, and effective internal and trans-border control. See S. Krasner, ‘Sovereignty: Organized Hypocrisy’, Princeton U.P., 1999, p. 227; M. Fowler & J. Bunck, ‘Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty’, Pennsylvania State U.P., 1995.

⁵ The term non-state actors encompasses “a range of organizations that bring together the principal, existing or emerging, structures of the society outside the government and public administration” (Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee Participation of Non-State Actors in EC Development Policy (Brussels, 07.11.2002, COM (2002) 598 final). For text: <http://www.zpok.hu/img_upload/f880a7b608b6eaa8411125e501dc0547/ec_ong_eu.pdf>.

⁶ Generally see J. Crawford, ‘The Creation of States in International Law’, Oxford U.P., 2nd ed., 2006, p. 45.

⁷ For text: <http://avalon.law.yale.edu/20th_century/intam03.asp>; for these criteria see J. Crawford, ‘The Creation of States in International Law’, 2nd ed., Oxford U.P., 2006

⁸ *ibid*

⁹ I. Brownlie, ‘The Principles of Public International Law’, Oxford U.P., 7th ed., 2008, p. 70.

¹⁰ D.J. Harris, ‘Cases and Materials on International Law’, Sweet and Maxwell, 6th ed., 2004, pp. 99.

other states plays a pivotal and crucial role in creation of a new state.¹¹ Although an in-depth analysis of the notion of statehood in international law is beyond the remit of this study it suffices to say that the above criteria provide a yardstick as to the concept of statehood in international law. Therefore, the term non-state actor constitutes an actor in the international arena that is not an entity according to the definition provided above or responsible to a particular state.¹² In today's world, at the one end of the spectrum are 193 sovereign states and on the other a wide range of non-state actors such as non-governmental organisations (NGOs) such as Green Peace International, as well as NSAGs variously described as rebels, guerrillas, freedom fighters, insurgents, terrorists, armed opposition groups, and national liberation armies.¹³

1.1 Non-State Armed Groups: a working definition

For this study it is of paramount importance to arrive at a working legal definition in which the issue of NSAGs could be addressed. Today the term NSAGs covers a great variety of armed groups, ranging from the well-armed militias such as Hezbollah in southern Lebanon and the Kurdish Workers Party (PKK), to small groups of bandits and criminal gangs levying taxes in remote roads in Africa and South America. However, due to the controversial and politically oriented nature of NSAGs there is no general consensus on how to define these organizations or what their legal obligations are.¹⁴ Furthermore, the sheer number of such armed groups' in armed conflicts globally makes it even more difficult to devise a clear and comprehensive definition. This is in the light of the fact that they operate in different regions of the world and may have different structures, motives, resources, political and social agendas. Historically, a member of NSAG (irregular or guerrilla fighters), was an individual who fought by asymmetrical means against an invading force.¹⁵ This is not surprising since most of the conflicts prior to the second half of the twentieth century were of international

¹¹ P. Malanczuk, 'Akehurst's Modern Introduction to International Law', Routledge, 7th ed., 1997, pp. 82-83.

¹² M.E. O'Connell, 'Enhancing the Status of Non-State Actors through a Global War on Terror?', 43 *Colum. J. Transnat'l L.* 435 2004-2005, p. 437.

¹³ H.F. Spiner, 'Accounting for Human Rights Violations by Non-State Actors', in 'Non-State Actors in the Human Rights Universe', G. Andreopoulos & Z.F. Kabasakal-Arat (ed.), Kumarian Press, 1st ed., 2006, p.44

¹⁴ A. Clapham, 'Human Rights Obligations of Non-State Actors', Oxford U.P., 2006, especially Chapter 7, pp. 271-316.

¹⁵ Quoted in Telford Taylor, 'Foreword' in Leon Friedman (ed.), 'The Laws of War: a Documentary History', Vol. 1, New York, Random House, 1972, p. xvi

nature or inter-state wars, and civil wars were not covered by the laws of war, nor were they as commonplace and prominent as today.¹⁶

In traditional international law in order to qualify as a NSAG, four conditions had to be satisfied namely: (i) some level of hierarchical structure or organizational coherence; (ii) the use of violence for particular political ends; (iii) certain degree of independence from state control; and crucially (iv) some degree of territorial control.¹⁷ After the experience of major civil wars such as the Spanish Civil War, in the first half of the twentieth century, Common Article 3 of the Geneva Conventions of 1949 was the very first international instrument to deal with the issue of civil war, to extend a minimum standard of humanitarian protection to the parties involved: ‘...in the case of armed conflicts not of an international character occurring in the territory of one the high contracting parties, each party to the conflict shall be bound to apply as a minimum...’ The article goes on to describe what provisions shall apply in this situation. But it does not specifically provide a definition for armed groups involved in those conflicts. The very first influential definition of NSAGs can be found in the Additional Protocol II to the Geneva Convention of 1977 which refers to groups involved in:

...conflicts taking place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol.¹⁸

It is fair to say that this definition is considerably stricter than the definition provided in Common Article 3 and it requires an effective control over a certain part of the territory of the parent state by the said NSAG, whereas Common Article 3 requires no such prerequisite. But the strictest definition of “armed group” is found in regard to prisoner of war status, for armed combatants to be granted prisoner of war status in Additional Protocol II to the Geneva Conventions (1949) they have to be (i) under a command structure responsible for its subordinates; (ii) have a fixed distinctive sign recognizable from a distance; (iii) carry their arms openly; and (iv) adhere to customs and rules of war.¹⁹

At this stage, it is worth noting that there is also a great deal of reluctance on the part of sovereign states to admit the applicability of the Geneva Conventions more specifically the

¹⁶ See SIPRI Yearbook, ‘armament, disarmament and international security’, Oxford U.P., 2005 and 2006, p. 83 & p. 108.

¹⁷ R.H. Shultz, D. Farah, I.V. Lochard, ‘Armed Groups: a Tier-One Security Priority’, Occasional Paper 57, USAF Institute for National Security Studies, USAF Academy Colorado, 2004.

¹⁸ Additional Protocol II to the Geneva Conventions 1949, Part I, Article 1(1).

¹⁹ See Additional Protocol I to the Geneva Conventions 1949, art. 43-47.

Additional Protocol II, fearful of recognizing NSAGs' legitimacy, as they would consider them as mere "rebels" or "terrorists".²⁰ This is in the light of the fact that tacit admission by states may ultimately encourage these groups to claim that they are engaged in internationally recognized armed struggle and no longer come under the ambit of the domestic criminal law mechanism of those sovereign states in which they are operating.²¹ The above scenario is especially true in many less developed parts of the world, which in the aftermath of achieving independence through the process of decolonization, could no longer maintain law and order in their territories due to weak central governments. This has created a situation in which NSAGs based on distinct national and ethnic affiliations are formed and flourish in those fragmented states.²² However from political and legal point of view such armed groups lack the formal recognition previously awarded to national liberation armies who were exercising their right to self-determination and engaged in wars of national liberation against alien occupation, colonial domination or racist powers.²³

The more contemporary working definition of NSAGs has been articulated by organizations which strive to hold such armed groups to respect and adhere to humanitarian norms. Organizations such as Geneva Call (GC) which aims to get NSAGs to adopt "*deeds of commitment*" to stop the use of landmines refer to such organizations as non-state actors. According to GC the non-state actors engaged in armed conflict refers to: 'any armed actors operating outside state control that use force to achieve its political/quasi-political objectives, such actors, include armed groups, rebel groups, liberation movements and "*de facto*" governments'.²⁴ Some scholars consider depiction of NSAGs as non-state actors in this context as erroneous usage of the term. In the opinion of the author, the term non-state actor is rather general and puts armed groups together in the same category as other non-state actors such as the ICRC, Geneva Call and Human Rights Watch.²⁵ The International Council on Human Rights on the other hand has developed a broader definition for NSAGs which

²⁰ See L.F.E. Goldie, 'Profile of a Terrorist: Distinguishing Freedom Fighters from Terrorists', 14 *Syracuse Journal of International Law and Commerce*, 1987, pp. 125-139.

²¹ M.E. O'Connell, 'Reshaping Dogs of War', *AJIL* 446, 2003, p. 454, (as in the case of the British Government which always maintained the Irish Republican Army (IRA) was a criminal organization and the IHL did not apply to the crisis.

²² See P.B. Rich, 'Warlords in international Relations', Palgrave Macmillan, 1st ed., 1999; see also A. Hills, 'Warlords, Militia and Conflict in Contemporary Africa: Re-Examination of Terms', *Small Wars and Insurgencies*, Vol. 8, No. 1 (Spring 1997), pp. 35-51;

²³ Protocols Additional to the Geneva Conventions of August 1949, Part I, art. 1(4), see also D. Kay, 'The Politics of Decolonization: The New Nations the UN Political Process', *International Organization*, 21 (1967), pp. 786-811; General Assembly Resolution 3103 (XXVIII).

²⁴ <<http://www.genevacall.org/about/about.htm>>.

²⁵ <http://www.armedgroups.org/sites/armedgroups.org/files/AGP_Working_Paper_5_-_Policzer_March_05_.pdf>.

depicts such groups as those which are: 'armed and use force to achieve their objectives and are not under state control'.²⁶ This fluid definition was developed under the premise that such armed groups are motivated by political ideologies, religious extremism and economic objectives which excludes organizations that pursue private agendas such as criminal organizations, drug cartels, mercenaries as well as private military firms.²⁷

It is interesting to note that in the more recent definitions provided above there is an apparent lack of emphasis on holding of a certain part of territory of a state by NSAGs which is a prerequisite set in Additional Protocol II. Indeed, this is a fair reflection of the fact that many NSAGs are not in control of certain part of territory of the state they are operating in but pose as much threat to law and order as the case of Kurdistan Workers' Party (PKK) operating in south eastern Turkey and the Party of Free Life of Kurdistan in Iran in the twenty-first century clearly illustrate. As will be made clear below, although, PKK does not hold any part of the Turkish territory, however, it has been able to engage the might of the Turkish national army since 1984, one of the most powerful armies in the region and member of North Atlantic Treaty Organization (NATO).²⁸

Indeed this marks quite a departure from traditional International Humanitarian Law (IHL) which has made a clear distinction between NSAGs that control part of the territory of the host state, and in reality act as *de facto* administration of that territory, and organizations that do not meet these criteria.²⁹

It is obvious that in the current globalized world the dichotomy between state and non-state coercive use of force is somewhat outdated.³⁰ It should also be made clear that in the twenty-first century some of these groups have turned their attention to criminal activities to generate much-needed funds. Hence, the distinction between groups with clear political programs and

²⁶ International Council on Human Rights Policy, 'Ends and Means: Human Rights Approaches to Armed Groups', 1999, pp. 5-6.

²⁷ William Lietzau, 'Combating Terrorism: The Consequences of Moving from Law Enforcement to War' in D. Wippman & M. Evangelista (ed.), 'New Wars, New Laws: Applying the Laws of War in 21st Century Conflicts', Transnational Publishers, 1st ed., 2005, p. 41.

²⁸ Adoption of this approach by the abovementioned NGOs is quite understandable because the purpose of their operations is mainly engaging smaller and loosely organized bands of armed groups predominantly in the so-called failed states in the Sub-Saharan Africa; on the phenomenon of "failed states", see D. Thurer, 'The "failed state" and International Law', 81 *IRRC* 1999, p. 731; see also S. Chesterman, (ed.) 'Making States Work: State Failure and the Crisis of Governance', United Nations University, 2005; R.I. Rotberg, 'When States Fail: Causes and Consequences', Princeton U.P., 2003.

²⁹ On this point commentators such as Andreopolous have argued that in today's global set-up even if a special accountability mechanism could be established to address the former, it could hardly deal with the problems posed by the latter, the enormity of this task is even more aggrandized by the consideration that nowadays many of these organizations operate in a grey zone between politics and criminality: G.J. Andreopoulos, 'On the Accountability of Non-State Armed Groups', in 'Non-State Actors in Human Rights Universe, Kumarian Press, 1st ed., 2006, pp. 141-163, at 145.

³⁰ O. Schachter, 'The Right of States to Use Armed Force', 82 *Mich. L. Rev.* 1620, 1983-84, pp. 1620-1621.

criminal organizations is somewhat eroding. As a result, the new approach adopted by organizations such as International Committee of Red Cross (ICRC) reflects this ever-changing nature of NSAGs. According to ICRC:

‘Amongst armed groups, the distinction between politically-motivated action and organized crime is fading away. All too often, the political objectives are unclear, if not subsidiary to the crimes perpetrated while allegedly waging one’s struggle... Are we dealing with a liberation army resorting to terrorist acts, or with a criminal ring that tries to give itself political credibility? Are we dealing with a clan-oriented self-defence militia relying heavily on criminal funding, or with a Mafia-like gang whose constituency is strongly intertwined with ethnic communities?’³¹

Consequently, the present author is of the opinion that the definition of NSAGs adopted by this study should reflect the ever-changing nature of NSAGs in the wider global setting which inevitably reflects the very nature of the NSAGs under consideration in Kurdistan. As will be seen below, the Kurdish NSAGs’ development from purely tribal fighting groups in the aftermath of the World War I and their revolts against the newly established sovereign states to highly organized NSAGs is indicative of this concept. For the purpose of this study the author is of the opinion that a clear distinction has to be made between NSAGs that pursue a political or religious ideology, are capable of mounting major military operations, and have considerable support within their communities and smaller loosely organized band of armed groups devoid of a clear political program which resort to criminality to survive on the other. For the NSAGs based in Kurdistan under consideration in this study, a political goal is of paramount importance and an end in itself, not a secondary instrument for advancement of other interests such as accumulation of wealth. The NSAGs in question are groups which operate in a certain territory, who resort to violence for specifically political ends with ultimate ambition of overthrow, seizing power, supplant the central government or else to secede and form a separate state for a certain part of that territory or as the recent trend indicates having more political and minority rights within the existing sovereign states. Therefore, to avoid partiality and ambiguity in this study the term NSAG is used as a generic label, used as a *lieu* which encompasses all non-state irregular forces such as rebels, guerrillas, freedom fighters, insurgents, terrorists, armed opposition groups, national liberation armies as well as *de facto* administrations.

³¹ International Committee of Red Cross, ‘Holding Armed Groups to International Standards: An ICRC contribution to the research project of International Council on Human Rights Project (ICHRP)’, ICRC, 1999, pp. 2-3.

It has to be emphasised that individuals or groups which are not acting on behalf of a state are non-state actors. Therefore, a non-state actor does not act under the control of a state and is not part (*de facto or de jure*) of any state apparatus and maintains its identity and existent independent of the state.³² However, as in the case of NSAGs in Kurdistan and the wider Middle East, it is argued that they maintain links to a particular state mainly due to ideological basis or becoming a pawn in the geopolitical chess game of the region. Throughout the 1960s and 70s the Shah's regime in Iran directly supported (under the auspices of the US administration) the insurgency of the Kurdish NSAGs under Mullah Mustafa Barzani.³³ To off-set this the Ba'athist regime under Saddam Hussein in Iraq, in turn, actively supported the Kurdistan Democratic Party of Iran (KDP-Iran).³⁴ Further, it has been a well-known fact that the PKK was provided generous financial and logistical support by the Assad regime in Syria and other interested states in the region such as Greece and the Islamic Republic regime in Iran.³⁵

For the purpose of this study I will adopt the following definition depicting the Kurdish NSAGs under consideration. They are groups which challenge the authority of the state they are operating in, challenge the rule of law of those states, however, not necessarily exercise control over part of the territory of the host state as to enable them to carry out sustained and concerted military operations, use violence in unconventional asymmetrical ways to achieve their aims, as well as operating across state boundaries, and make use of factional schisms that effect their ability to operate effectively.³⁶ But crucially they all have a political agenda which is ultimately aimed to achieve statehood. The most significant aspect of Kurdish NSAGs is that they operate within the territories of the sovereign states under consideration

³² For an elaboration of the standards and tests for determining whether individuals or groups are state agents, and whether their action can be attributed to the state, see 'Draft Articles on Responsibility of states for Internationally Wrongful Acts', International Law Commission, 53rd Session (2001) arts 4-11 (extract from the 'Report of the International Law Commission on the Work of its Fifty-Third Session', Official Records of the General Assembly, 56th session, supp no 10 (A/56/10), chap IV.E.1, November 2001); *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, [1986] ICJ Rep 14, para 93-116; *Prosecutor v. Dusko Tadic*, Case no IT-94-1-A, ICTY App Ch, 15 July 1999, para 146-62; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia*, Judgement on Merits, General List No 91; ICGJ 70 (ICJ 2007) 26 February 2007, para 379-415. There may also be links in the form of post-facto endorsement, see *Case Concerning United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, 1980 ICJ Rep 3.

³³ P.G. Kreyenbroek and S. Sperl, 'the Kurds: A Contemporary Overview', Routledge-Curzon, 1991, P. 61.

³⁴ N. Entessar, 'Kurdish Politics in the Middle East', Lexington, 2009, p. 48.

³⁵ For the PKK's foreign connections generally see Ismet G. Ismet, 'The PKK: A Report on Separatist Violence in Turkey (1973-1992)', Turkish Daily News Publications, 1992, p. 205

³⁶ See T. Pfanner, 'Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action', *IRRC* (2005) pp. 149-174.

and extraterritorially as in the case of PKK in Turkey and the Party for a Free Life of Kurdistan (PJAK) in Iran.

1.2 The three Kurdish entities of Iran, Iraq and Turkey

What makes the question of Kurdistan compelling as a recognized geographical entity, in spite of the fact that the regional states may deny its reality, is the fact that it does exist according to relatively well defined limits in the minds of most Kurdish political groups.³⁷

The concept of armed conflict has always been part of the Kurdish way of life throughout their history especially since the end of the World War I and the collapse of the Ottoman Empire. For nearly a century, Kurdish people have been embroiled in armed conflicts against the central governments of Iran, Iraq and Turkey resulting in enormous loss of lives. This is hardly surprising since the three aforementioned states throughout the twentieth century were ruled by quasi-military regimes which never tolerated any challenge to their authority. The situation of armed conflict in Kurdistan is not unique in the world. However, it does indicate a trend in armed conflicts that globally involves NSAGs. There are many examples of conflicts involving a distinct population taking up arms against the central government of a sovereign state for a variety of reasons. However, what makes the case of the Kurdish example compelling is the fact that the Kurdish populations are spread across the borders of five countries in the Middle East, namely, in eastern Turkey, northern Iraq, and north-western Iran and in smaller populations in northern Syria and Armenia.

The reason for selection of the three Kurdish regions as a microcosm of the activities of NSAGs and armed conflict is that it encapsulates the very nature and *modus operandi* of NSAGs in that region as well as globally throughout the Twentieth Century and beyond. The Kurdish NSAGs under consideration in this study indicate the range of characteristics of such armed groups. The microcosm is also used to illustrate the developmental approach of international law towards civil war/internal armed conflicts from treating it as purely internal concern of a sovereign state to the codification of international law through instruments such as the Charter of the UN in 1945, the Universal Declaration of Human Rights (UDHR) in 1948 and the Geneva Conventions of 1949 albeit in a minimalistic way through Common Article 3 to all the four Geneva Conventions.

³⁷ It has to be appreciated that there is a fundamental difference between mythical and practical interpretation of Kurdistan as a political entity; McDowall, 'A Modern History of the Kurds', I.B. Tauris, New Edition, 2003, p. 3.

1.3 Methodology of the thesis

This thesis draws on several scholarly discourses in order to achieve its aim. It is recognized by the author that the switching between different fields of international law in the course of this study may prove burdensome for the reader. However, attempts have been made to lighten the encumbrance by providing sufficient background information for each particular field. In order to enhance this process, in relation to the microcosm under consideration, sufficient historical and political backgrounds (through literature analysis) have been provided. In contrast to domestic legal systems, with respect to international law it is not possible to point to institutions endowed with readily identifiable legislation and executive function.³⁸ In other words, there is no international government and no system of international legislation. International law is primarily a system of customary rules which is increasingly supplemented by rules and principles enshrined in treaties. These two sources of international law are ‘positive international law’ in that the laws they generate are based on norms agreed upon by sovereign states. Notwithstanding the fact that there is no doctrine of *stare decisis* in international law, judgment and pronouncements of international and domestic courts and tribunals are increasingly relied upon as persuasive norms of international law resulting from custom, treaties and the general principles. The absence of a formal mechanism for law-making enhances the importance of material sources that are ‘evidence of the existence of consensus among states concerning particular rules or practices.’³⁹ The starting point for a researcher in international law is Article 38(1) of the Statute of International Court of Justice (ICJ), generally recognized as an authoritative sources of international law, notwithstanding the fact that it does not specifically mention ‘sources’.⁴⁰ Article 38 is considered the cornerstone of positivist approaches since it makes a distinction between legal obligations from non-legal practice.⁴¹ It provides:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply;

- (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) International custom, as evidence of a general practice accepted as law;

³⁸ M.N. Shaw, ‘International Law’, Cambridge U.P., 2008, 6th ed., p. 70.

³⁹ I. Brownlie, ‘Principles of Public International Law’, 7th ed., Oxford U.P., 2008, p. 4.

⁴⁰ See e.g. M.S. McDougal & W.M. Reisman, ‘The Prescribing Function: How International Law is Made’, 6 *Yale Studies in World Public Order*, 1980, p. 249.

⁴¹ G.M. Danilenko, ‘Law-Making in the International Community’, Kluwer Publishing, 1993, p. 14-15

- (c) The general principle of law recognized by civilized nations;
- (d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Mindful of the above Article, this study pays special attention to three exclusive law-creating processes namely; international conventions, custom and general principle of law, judicial decisions and academic writings. Moreover, newspaper articles, journals and academic legal researches regarding the Kurdish issue have also been utilized.

One needs to mention that some materials in this thesis were collected from the variety of sources. The present author benefited immensely from having access to the Oxford University Bodleian Law Library and the Library at the Middle East Centre of St Anthony's College, Oxford. It is pertinent to point out that the materials collected from the aforementioned institutions have proved extremely important and invaluable to this study. Moreover, as a result of direct collaboration with Dicle University in Diyarbakir and Turkish National Police Academy in Ankara, the author was granted the opportunity to carry out research in those institutions for a period of two months. During this period a series of interviews with a number of academics, practitioners, military and police officers were carried out which remain confidential, although the information obtained through these interviews has certainly enhanced the substance of the present study.

1.4 Classification of armed conflict in Kurdistan

1.4.1 International armed conflict

An international armed conflict is a conflict between two or more states' armed forces, no declaration of war or recognition of the state of war between the two states is required.⁴² It is a well-known fact that international armed conflicts are regulated by the four Geneva

⁴² Sandoz, et al., 'Commentary on the Additional Protocols', *op. cit.*, p. 39.

Conventions of 1949⁴³ (hereinafter GC 1949) and Additional Protocol I (hereinafter Protocol I) of 1977.⁴⁴ The Geneva Conventions (1949) set out conditions in which they apply:

To all cases of declared war or of any other armed conflict which may arise between two or more of High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.⁴⁵

According to the Commentary on the Geneva Conventions: ‘any hostile act—no matter how minor—by one state against another makes applicable all of international humanitarian law’.⁴⁶ If such acts were to take place by one state against another they would be construed as an act of war. Schindler also supports this approach by saying that ‘the existence of an armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts of the armed forces of two states clash with each other.’⁴⁷

On this point the Commentary on the Geneva Conventions reiterate the point that in the ambit of international armed conflict any hostile act no matter how minor by one state against another would bring the international humanitarian law (IHL) into operation.⁴⁸ However, it does not mean that the whole corpus of IHL must be applied. On this point Sandoz notes that inter alia the rules on prisoners of war cannot be applied, particularly, if there are no prisoners and the rules on occupation cannot apply if there is no occupied territory.⁴⁹ The case-law of the International Court of Justice (ICJ) and International Criminal Tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), have also elaborated on the concept of international armed conflict in relation to NSAGs. In the *Nicaragua* case the ICJ had to deal with the question of whether financing of the Contra by the United States was in breach of the IHL and the ensuing conflict between the contra and Nicaraguan army was

⁴³ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, 75 *U.N.T.S.* 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, 75 *U.N.T.S.* 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, 75 *U.N.T.S.* 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, 75 *U.N.T.S.* 287.

⁴⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, 1125 *U.N.T.S.* 3.

⁴⁵ Art. 2 Common to Geneva Conventions of 1949.

⁴⁶ See J.S. Pictet, *Commentary of the Geneva Conventions of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva, ICRC 1956), pp. 28.

⁴⁷ D. Schindler, ‘the Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’, (1979) 163(II) *Recueil des cours* 117.

⁴⁸ J.S. Pictet, *Commentary of the Geneva Convention of 12 August 1949 for Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva, ICRC 1956) p. 28.

⁴⁹ Sandoz, Y., ‘International Humanitarian Law in the Twentieth Century’, *YIHL*, Vol. 6, 2003, p. 12.

tantamount to an international armed conflict.⁵⁰ The ICJ held that the United States had to exercise “effective control” and the control should be regarding a particular operation in which the breach of IHL has taken place in order to render the armed conflict international. In the *Tadic* case, according to the Appeal Judgment of the ICTY, a NSAG becomes the *de facto* organ of the state; even though it is not designated as by the states’ own municipal law, and all or any of its acts become the act of the state.⁵¹ The ICTY judges in the *Tadic* case had to determine whether the armed conflict in the former Yugoslavia was international or non-international. Disagreeing with the Nicaragua judgement they held:

In order to attribute the acts of a military or paramilitary group to a state, it must be proved that the state wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the state be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the state should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.⁵²

On the basis of this rationale the Appeal Chamber held that paramilitary activities of the *Republika Srpska* armed forces were under overall control and on behalf of the Federal Republic of Yugoslavia and hence the armed conflict in that territory was categorized as an international armed conflict.⁵³ Therefore, if it is proved that a NSAG is under overall control of a sovereign state it becomes an organ of that particular state and as result the armed conflict which the said NSAG is involved in becoming an international one.

1.4.2 Internal armed conflict

The most challenging task in the contemporary international security situation is ascertaining whether there is a non-international armed conflict in progress in order to enforce the normative provisions of IHL.⁵⁴ To establish whether an internal armed conflict is taking place is even more of a task than an interstate one, since, at least one of the parties (in the shape of

⁵⁰ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Judgement (merits), 27 June 1986, ICJ Report, at 17.

⁵¹ *Prosecutor v Tadic*, Appeals Chamber Judgement, 15 July 1999, IT-94-1-A.

⁵² *Ibid*, para 131.

⁵³ *Ibid*, para 161.

⁵⁴ K. Watkins, ‘21 Century Conflicts and International Humanitarian Law: Status Quo or Change?’, in M.N. Schmitt & J. Pejic (eds.) ‘International law of Armed Conflict: Exploring the Faultlines’, Martinus Nijhoff, 2007, pp. 265-296, p.269.

a NSAG) to such conflicts lacks legal standing.⁵⁵ This is in light of the fact that the existence of an international armed conflict involving two states is much easier to establish. Furthermore, states engaged in international armed conflict see it beneficial to respect IHL for the protection of their own troops. On the other hand, establishing whether there is an internal armed conflict where the very existence of the state may be at stake is a more difficult undertaking.

Internal armed conflict can be described as use of armed forces within the borders of a state between the established government and an armed group for the purpose of challenging the legitimacy of that government.⁵⁶ The civil war in Sierra Leon between 1991 and 2001 is an example of this form of conflict.⁵⁷ It could also be the case that a section of the population strives to secede from a sovereign state in order to form a new independent state.⁵⁸ There can also be other types of internal armed conflicts, where in search of more freedoms NSAGs to establish an autonomous region in order to achieve more democratic rights by internalizing human rights and democratic norms.⁵⁹ Because of the state-centric nature of international law and reluctance of sovereign states to recognize new states, the latter form of non-international armed conflict seems to be a lot more common place now. Moreover, a central government would always maintain that there is no armed conflict in progress, hence, 'seeking to render humanitarian law inapplicable and reduce their legal obligations to armed opponent.'⁶⁰

It has also been suggested that increasingly internal armed conflicts can take place between different NSAGs without the involvement of the central government either because it is more prudent to remain neutral or it is too weak to intervene, as the civil war in Lebanon between

⁵⁵ Y. Sandoz, 'International Humanitarian Law in the Twenty-First Century', *YIHL*, Vol. 6, 2003, p. 13.

⁵⁶ According to Encyclopaedia of Public International Law civil war is "a war between two or more groups of population of the same state", Encyclopaedia of Public International Law Vol. I, North-Holland, 2001, p. 597; L. Oppenheim and H. Lauterpacht, 'International Law: a Treatise' (London: Longman, 1952) vol. II, p. 209: describes: "A civil war exists when two opposing parties within a state have recourse to arms for the purpose of obtaining power in the state, or when a large portion of the population of a state rises against the legitimate government"; Green, 'The Contemporary Law of Armed conflicts', *op. cit.*, p. 343: defines it 'a non-international armed conflict is one in which the governmental authorities of a state are opposed by groups within that state seeking to overthrow those authorities by force of arms'; 'The Manual on the Law of Non-International Armed Conflict' defines Non-International Armed Conflict as: "armed confrontations occurring within the territory of a single state and in which the armed forces of no other state are engaged against the central government":
<<http://www.michaelschmitt.org/images/Manual%5B1%5D.Final.Brill..pdf>>.

⁵⁷ For background information see the separate opinion of Justice Robertson in *Prosecutor v. Kondewa*, Case No. SCSL-2004-14-AR72 (E), 25 May 2004 at paras. 5-6.

⁵⁸ For an analysis of Post-Cold War secessionist aspirations see M.G. Kohen, 'Secession: International Law Perspective', Cambridge U.P., 1st ed., 2006.

⁵⁹ It has been noted by Gardner that Non-State Actors that behave in this manner are more likely to receive international support; A.M. Gardner, 'Beyond Standards before Status: Democratic Governance and Non-State Actors', *Review of International Studies*, Vol. 34(3), 2008, pp. 531-552.

⁶⁰ Moir, 'Non-International Armed Conflict and Guerrilla Warfare', *op. cit.*, p. 328.

1970 and 1990 clearly illustrates.⁶¹ This was confirmed by the International Criminal Tribunal for the Former Yugoslavia (ICTY),⁶² that as in the case of the so-called failed states, the central governments are so weak to function that they inevitably lose their monopoly on coercive use of force the very preserve of the Westphalian notion of statehood.⁶³

As will be discussed below, internal armed conflict under modern international law is regulated by Common Article 3 to all Geneva Conventions of 1949 and Additional Protocol II of 1977.⁶⁴ In relation to internal armed conflict, there must be a certain level of intensity to the conflict to differentiate between fully-fledged armed conflict and internal security operations as a result of a mere civil strife or disturbance.⁶⁵ Furthermore, existence of three different definitions of non-international armed conflict in international treaties namely, Common Article 3, Additional Protocol II and more recently, the Rome Statute of the ICC makes this task much more difficult.⁶⁶

It is stated that Common Article 3 is applicable 'in the case of armed conflict not of an international character,'⁶⁷ but it does not provide any guidance how to ascertain that. Additional Protocol II does not offer any further clarification in terms of the definition of such armed conflicts.⁶⁸ Nevertheless, in Article 1(1), Additional Protocol II does list a number of criteria which require that the armed conflict should take place between 'the armed forces of a High Contracting Party and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over part of [the state's] territory as to enable them to carry out sustained and concerted military operations and to implement [the] Protocol.' Therefore, it is the intensity of the conflict and the organization of the parties especially the NSAGs that distinguish an internal armed conflict from mere acts of banditry and civil strife.⁶⁹ Article 1(2) makes it absolutely clear that it does not apply to situations of 'internal disturbances and tensions, such as riots, isolated and sporadic acts of

⁶¹ See K.S. Salibi, 'Crossroads to civil war: Lebanon, 1958-1976', Delmar: Caravan Books, 1st ed., 1976.

⁶² *Prosecutor v. Dusko Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Jurisdiction)(Appeals Chamber), 105 *ILR* (1997) para. 419, at p. 488.

⁶³ For Weberian point of view on the monopoly of coercive use of force by states see M. Weber, 'Political Writings', Peter Lassman & Ronald Speirs (ed.), Cambridge U.P., 1994, pp. 309-311; also M. Ignatieff, 'The Warriors' Honour', Vintage Publications, 1st ed., 1999, p. 159.

⁶⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), 1977, 1125 U.N.T.S. 609.

⁶⁵ See Sandoz, et al., 'Commentary on the Additional Protocols', *op. cit.*, Para. 4438; P. Kooijmans, 'In the Shadow-land Between Civil War and Civil Strife', in 'Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honor of Frits Kalshoven, A. Delissen and G. Tanja, (ed.), Dordrecht: Nijhoff, 1st ed., 1991, pp. 226-227; J.E. Bond, 'The Rules of Riot: the Internal Conflict and the Law of war', 1st ed., Princeton U.P., 1974.

⁶⁶ E. La Haye, 'War Crimes in Internal Armed Conflict', Cambridge U.P., 2008, p. 7.

⁶⁷ Common Article 3, *ibid.*

⁶⁸ Pictet, 'Commentary on the Geneva Conventions', *op. cit.*, p. 48.

⁶⁹ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement of 2 September 1998, 37 *ILM* 1399 (1998).

violence and other acts of similar nature.⁷⁰ Protocol II ‘develops and supplements Article 3 without modifying its existing condition of application.’⁷¹ Hence, it has been noticed that although Additional Protocol II was to develop and supplement Common Article 3, both Common Article 3 and Additional Protocol II can apply to different armed conflict situations according to the level of intensity.⁷² Therefore, as mentioned above, in most cases Common Article 3 applies to situations of non-international armed conflict because of its lower threshold of intensity.⁷³

1.4.3 Internationalized armed conflict

The events in Libya in 2011 brought into sharp focus the ambiguity regarding the classification of armed conflict regarding NSAGs. In a situation which initially appeared to be an internal armed conflict but eventually becomes internationalized by virtue of involvement of outside stake holders. According to Stewart:

The ‘internationalized armed conflict’ describes internal hostilities that are rendered international. The factual circumstances that can achieve that internationalization are numerous and often complex: the term internationalized armed conflict includes war between two internal factions both of which are backed by different states; direct hostilities between two foreign states that militarily intervene in an internal armed conflict in support of opposing sides; and war involving a foreign intervention in support of an insurgent group fighting against an established government. The most transparent internationalized internal armed conflicts in recent history include NATO’s intervention in the armed conflict between the Federal Republic Yugoslavia (FRY) and the Kosovo Liberation Army (KLA) in 1999 and the intervention undertaken by Rwanda, Angola, Zimbabwe, Uganda and others, in support of opposing sides of the internal armed conflict in the Democratic Republic of Congo since August 1998.⁷⁴

Marko Milanovic is of the opinion that the following two conditions render an internal armed conflict internationalized:

⁷⁰ Protocol II, *op. cit.*, at Article 1(1).

⁷¹ Article 1(1) of Protocol II.

⁷² Moir, ‘Non-International Armed Conflict and Guerrilla Warfare’, *op. cit.*, p. 328.

⁷³ Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 167; Von Hebel & Robinson, ‘Crimes in the Jurisdiction of the Court’, *op. cit.*, p. 121.

⁷⁴ J.G. Stewart, ‘Towards a Single Definition of Armed Conflict in International Humanitarian law: A Critique of Internationalized Armed Conflict’, *IRRC* June 2003 Vol 85 No 850, p. 315.

- (1) State A intervenes into an internal conflict in state B, in support of the non-state actor and against state B. This is the Bosnian scenario, where Serbia and Croatia supported the Bosnian Serbs and Croats against the internationally recognized government of Bosnia. This is likewise the scenario of the coalition attack on Afghanistan post 9/11, when they acted jointly with the Northern Alliance against the Taliban who were then the *de facto* government of Afghanistan, before the new government of Afghanistan was set up.
- (2) State A attacks a non-state actor located in state B, without B's consent. This is the scenario of the 2006 Israel-Hezbollah conflict in Lebanon.⁷⁵

However, the authors of 'the Manual on the Law of Non-International Armed Conflict' express doubt regarding the existence of such a category of armed conflict:

When a foreign state extends its military support to the government of a state in which a non-international armed conflict is taking place, the conflict remains non-international in character. Conversely, should a foreign state extend military support to an armed group acting against the government, the conflict will become international in character. Admittedly, it is sometimes difficult to determine in the circumstances of a protracted non-international armed conflict whether there exists a government.⁷⁶

The nature of armed conflict in relation to Kurdish NSAGs and their resultant revolts with a variety of intensity have to be classified as internal armed conflicts. This is in spite of the fact that they display a transnational nature and almost none of the revolts under consideration throughout the twentieth century have been limited to a particular state's boundaries. As will be seen below this was even true of early revolts which the warring forces (both state and non-state) did not limit their operation to a particular country.

⁷⁵ Marko Milanovic, 'What Exactly Internationalizes an Internal Armed Conflict?' 7 May 2010, *EJIL*: Talk, available at: <<http://www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/>>.

⁷⁶ M.N. Schmitt, C.H.B. Garraway and Y. Dinstein, 'The Manual on the Law of Non-International Armed conflict with Commentary', Y. Dinstein & F. Domb (eds.), *Israel Yearbook of Human Rights* (Special Supplement), Vol. 36, Martinus Nijhoff, 2006, p. 6.

Chapter 2. The Kurds: an historical background

2.1 The land of the Kurds

2.1.1 The Kurds: a divided people

The Kurds are Sunni Muslim mountain-dwelling Indo-European tribes with their own language and culture comprising the fourth largest ethnic group in the Middle East.⁷⁷ The territory commonly known as Kurdistan (the land of the Kurds)⁷⁸ is a strategic area located in the heartland of the Middle East.⁷⁹ It is a predominantly mountainous region, bordering Syria to the west, Iran to the east, and Turkey to the north, Iraq to the south, lying where fertile plains meet the Zagros mountains in the east and Turkey's eastern mountains.⁸⁰

According to legends, the Kurds are the children of the populace who fled from the tyranny of *Zahhak*, an ancient ruler who symbolises violence and evil, a well-known figure who also appears in Ferdowsi's classical epic *Shahnameh*.⁸¹ 'Kordestan' or 'Kordistan' as it was known by the successors to the Kurdish dynasties⁸² coincides with the Iranian province that was created in the twelfth century by sultan Sanjar, who belonged to the Turkish Seljuk dynasty and ruled most of Persia at the time.⁸³ The Province of *Kordestān* in Iran⁸⁴ is the only official recognition of the existence of any Kurdish entities in the area where the Kurds are settled.⁸⁵ It has been noted that references were made to the Kurds in Sumerian inscriptions dating 2000 BC, found near Lake Van in modern-day Turkey.⁸⁶ This mountainous area is characterised by heavy snow and rainfalls that are a water reservoir for the Middle and Near East, famous Tigris and Euphrates rivers as well as many other smaller rivers, such as

⁷⁷ Kurdish Democratic Politburo, Central Bureau for studies and Research, *Kurdistan: An Economic, Geographic and Historical Brief Explanation*, No. 33, Kurdistan, 1999, p. 6.

⁷⁸ Minorsky has considered the abstract meaning of the word 'Kurd' to be the ancient Persian term meaning 'nomad'; Vladimir Minorsky, 'the Tribes of Western Iran', *the Journal of the Royal Anthropological Institute of Great Britain and Ireland*, 75(1/2) (1945): p. 76.

⁷⁹ L. I. Meho, 'The Kurds and Kurdistan: A General Background', in L.I. Meho & K.L. Maglaughlin (ed.), 'Kurdish Culture and Society: An Annotated Bibliography', Greenwood Press, 2001, p. 3.

⁸⁰ According to Nader Entessar, the name 'Kurd' does not only include all people 'who claim to be original descendants of the Medes, but also a host of other ethnic and tribal groups who intermingled with each other and had created a new communities through miscegenation', N. Entessar, 'Kurdish Politics in the Middle East', Lexington Books, 2009, p. 3.

⁸¹ One of the more complete editions of the Work of Ferdowsi, *Shahnameh*, ed. By Jalal Khaliqi-Mutlaq, New York, Bibliotheca Persica, 1987.

⁸² Kerim Yildiz & Tom Blass, 'The Kurds in Iraq: the Past, Present and Future', Pluto Press, 2004, p. 21.

⁸³ Kendal Nezan, 'A Survey of the History of the Kurds', *Collected Contributions and Messages*, Paris: Kurdish Institute of Paris, March 1992, p. 31.

⁸⁴ The official website of Ostān-e Kordestān <<http://en.ostan-kd.ir/Default.aspx?TabID=51>>.

⁸⁵ Abdul Rahman Ghassemlou, 'Kurdistan and the Kurds', London, Collets Holdings, 1965, pp. 13-14.

⁸⁶ Mehrdad Izady, 'The Kurds: A Concise Handbook', London, Taylor & Francis, 1992, p. 31.

Khabur, Tharthar and Ceyhan, Greater and Lesser Zabs are watered throughout those mountains.⁸⁷ McDowall puts the term 'Kurdistan' into perspective:

Although the population is not exclusively Kurdish in much of this area, the dominant culture is Kurdish. Since the early 13th century much of this area has been called Kurdistan, although it was not until 16th century after the Kurds had moved north and west onto Anatolia plateau by a series of tribal migrations that the term Kurdistan came into common usage to denote a system of Kurdish fiefs. Since then, although the term Kurdistan appears on few maps, it is clearly more than a geographical term since it refers also to a human culture which exists in that land. To this extend Kurdistan is a social and political concept.⁸⁸

From the outset it has to be emphasised that the Kurdish way of life is very much influenced by its geographical locality.⁸⁹ The Kurds are distinct from Arabs, Persians and Turks of the region, but, ethnically and linguistically closest to the Persians. Their origins are traced back to the Empire of Medes, an Indo-European people, the nomadic tribes that lived between the Persian Gulf and the Caspian Sea centuries before the birth of Christ. Most scholars trace the beginning of Kurdish civilisation to pre-Christian times. The Greek historian Xenophon in *Anabasis* (Retreat of 10,000) in the fourth century BCE refers to the likely ancestors of Kurds as a disobedient tribe of fighters who made a living hell for the Greek army, according to him 'they dwelt up among the mountains, were a warlike people, and were not subjects of the king'.⁹⁰

There are no reliable figures available on the total number of the Kurds in the Middle East. Kurdish sources have at times claimed that their population amounts to thirty-five to forty million people.⁹¹ This is perhaps an exaggerated estimate given by different Kurdish political leaders and academics in order to accentuate their political demands.⁹² The majority of the Kurds, as the largest non-state actor in the Middle East reside in the south-eastern part of

⁸⁷ M.R. Izady, 'The Kurds: A Concise Handbook', Taylor & Francis Publishers, 1992, p. 13-21; also for a description of the geographical characteristics of Kurdistan see W.R. Hay, 'Two Years in Kurdistan: Experience of a Political Officer 1918-1920', Sidgwick & Jackson Ltd., 1921, pp. 13-34.

⁸⁸ D. McDowall, 'the Kurds, Minority Rights Group Report No. 23, rev. ed., 1985, p. 5.

⁸⁹ According to Pirbal, the first cartographic appearance of Kurdistan was in Al-Kashghari's map of 1076 A.D. (reproduced in G. Chaliand & J.-P. Rageau, 'A Strategic Atlas: Cooperative Geopolitics of the World's Powers, trans. By T. Bennet, Harper Collins, 1983, p. 62.

⁹⁰ Xenophon, 'The Persian Expedition', Penguin, 1984, pp. 11-28.

⁹¹ See K. Yildiz & M. Muller, *The European Union and Turkish Accession: Human Rights and the Kurds*, London, Pluto Press, 2008), pp. 4-6.

⁹² Entessar, 'Kurdish Politics in the Middle East', *op. cit.*, p. 3.

Turkey.⁹³ McDowall states that ‘Kurds in Turkey are 13 million (23 per cent), in Iraq 4.2 million (23 per cent), in Iran 5.7 million (10 per cent), and in Syria 1 million (6 per cent).⁹⁴ Nonetheless, significant surveys such as that carried out in 1990s estimated the Kurdish population to be over 30 million,⁹⁵ whilst others record much smaller numbers.⁹⁶ Furthermore, there has since the 1980s been a tangible Kurdish diaspora which has been very active in promoting, funding and shaping the nationalist movements,⁹⁷ an example of which Ben Anderson describes as “long-distance” nationalism. Nevertheless mainly due to unreliable official statistics all figures quoted in the cited literature lack precise evidence but do not deny the fact that the Kurds constitute one of the largest non-state actors in the Middle East.⁹⁸ As it is correctly pointed out, Middle Eastern history has all too often been written by its hegemons.⁹⁹

The Kurdish people have during their long existence, been ruled and divided between many dominating imperial powers such as Assyrians, Persians, Greeks, Romans, Arabs, Mongols and Ottomans but significantly have managed to outlive them all. However, they are, even now in the twenty first century, still divided between four major Middle Eastern powers of Iran, Iraq, Turkey and Syria as well as the former Soviet Republic of Armenia.¹⁰⁰ The similar but not identical cultural traits of these tribes reveal how diversity infuses the Kurdish culture.¹⁰¹ As a result of this varied ancestral background the Kurds speak different dialects, believe in a variety of religious sects and belong to different social strata. According to their place of residence, they are divided into ‘pastoral and nomadic’,¹⁰² ‘clans and tribes’.¹⁰³ The

⁹³ According to the Turkish minister Erman Şahin, in Demirel government, as reported in *Milliyet* (16 December 1991), the Kurds in Turkey numbered 15 million.

⁹⁴ McDowall, ‘A Modern History of the Kurds’, *op. cit.*, p. 3.

⁹⁵ Burkey speaks of 35 million, of which 18-20 million are resided in Turkey, 8-10 million in Iran, 5 million in Iraq, 1.5 million in Syria, Kemal Burkey, ‘the Kurdish Question; its history and present situation’, http://www.kurdistan.nu/english/eng_kurdish_question.htm

⁹⁶ The Kurds are estimated at between 20 and 25 million by Kenneth Katzman, ‘The Kurds in Post-Saddam Iraq’, CRS Report for Congress, Order No RS22079 (The Library of Congress, 5 February 2008), Olson also claims that the Kurds in the Middle East number between 20-25 million (with 10 to 12 million in Turkey, 5 to 6 million in Iran, 3.5 million in Iraq and 1 million in Syria); see R. Olson, ‘The Kurdish Question and Turkey’s Foreign Policy, 1991-1995: from the Gulf War to Incursion into Iraq’, *Journal of South Asian and Middle Eastern Studies*, 19(1)(Fall 1995), p.2.

⁹⁷ F. Halliday, ‘Can We Write Modernist History of Kurdish Nationalism’, in F.A. Jabar & H. Dawod (ed.), ‘The Kurds: Nationalism and Politics’, SAQI Publishing, 2006, pp.11-12; for Kurdish diaspora in Western Europe see A. Hassanpour & Shahrzad Mojab, ‘Kurdish Diaspora’, in ‘Encyclopaedia of Diaspora: Immigrant and Refugee Culture Around the World’, Vol. 2, pp. 214-223.

⁹⁸ Entessar, *Kurdish Politics in the Middle East*, p. 3.

⁹⁹ Izady, ‘The Kurds: a Concise Handbook’, *op. cit.*, p. 23.

¹⁰⁰ For a state-centric view of the Kurdish issue see S.C. Pelletiere, ‘the Kurds: the Unstable Element in the Gulf’, Westview Press, 1984, pp. 57-61.

¹⁰¹ W. Jwaideh, ‘The Kurdish National Movement: Its Origins and Development’, Syracuse U.P., 2006, pp. 11-12.

¹⁰² L. Everest, ‘Oil, Power and Empire: Iraq and the US Global Agenda’, 4th ed., 2004, p. 46.

diversity among the Kurds is reflected in the number of dialects spoken by them. The most widely spoken dialects among the Kurds are Kurmanji and Surani. Kurmanji is the dialect mostly spoken in Turkey and Syria and among some Iranian Kurds. Surani is spoken mainly by the Kurds in Iraq south of the Greater Zab as well as by the majority of the Kurdish population of the province of Kordistan in Iran.¹⁰⁴ With regard to religion, the mainstream Kurds are Sunni Muslims (of the Shafi'i legal school in contrast to their Arab and Turkish Sunni Neighbours) converted into Islam around the 12th and 16th century, but there are Shi'is, Yazdanists, the Ahl-e Haqq (people of truth), and Alawis (or the Qizilbash), with beliefs and rituals that are clearly influenced by Islam but owe more to other religions notably Zoroastrianism.¹⁰⁵ In addition, 2 per cent of the Kurds (that) are Yezidis (known to outsiders as devil worshipers) mostly reside in Syria, there are also a few thousands Christians and Zoroastrians and some two hundred Jewish families in the Iranian city of *Sanandaj* make up the religious affiliation of the Kurds.¹⁰⁶ It is worth noting that in the aftermath of the Arab conquest the Kurds played a crucial political role in the Islamic world. They provided important leaders in the Islamic world most notably the legendary *Salah-ed-din Ayyubi* (Saladin), who led the Islamic army against Richard the Lion Heart and the Crusaders.¹⁰⁷ In spite of this Saladin never ruled over the territory now known as Kurdistan, nor did he emphasise his Kurdish identity since he was foremost an Islamic warrior, not a Kurdish nationalist.¹⁰⁸

From the fifteenth century onwards however, the designation 'Kurd' no longer applied to nomadic tribes. Rather it referred to 'the people of the region of Kurdistan',¹⁰⁹ the region extending from 'the South East of Turkey, North east of Iraq, North West of Iran and North

¹⁰³ E. Cornell, 'Turkey in the 21st Century: Opportunities, Challenges, Threats', Curzon Press, 2001, p. 120.

¹⁰⁴ These dialects have all been influenced by surrounding modern languages and at times have evolved accordingly; see Servet Mutlu, 'Ethnic Kurds in Turkey: a Demographic Study', *International Journal of Middle Eastern Studies* 28 (1996), pp. 518-19; also Henry J. Barkley and Graham E. Fuller, *Turkey's Kurdish Question* (New York: Rowan and Littlefield Publishers, 1998), p. 63.

¹⁰⁵ McDowall, 'A Modern History of the Kurds', *op. cit.*, p. 10.

¹⁰⁶ There are also pockets of various Sufi orders of Nagshbandi and some Ali-Allahis (those who deify Ali, the first Shi'i Imam); see M. Short & A. McDermott, *The Kurds*, 3rd ed., (London, Minority Rights Group, March 1977), p. 6.

¹⁰⁷ C. Hillenbrand, 'the Crusades: Islamic Perspectives', Fitzroy Dearborn Publishers, P. 594.

¹⁰⁸ McDowall, 'A Modern History of the Kurds', *op. cit.*, p. 5.

¹⁰⁹ Şerefhan, Şerefname, *Kürt Tarihi*, Translated by Emin N. Bozarslan, (Istanbul: Yontem Yay, 1975), pp. 17-29.

East of Syria.¹¹⁰ Consequently, from the information above it can be deduced that the Kurds have been inhabitants of a specific land throughout their history.¹¹¹

It is worth noting that until the mid-twentieth century, religion played a pivotal role in the Kurdish nationalist movement. In fact, according to Meho, ‘many of the Kurdish rebellions which broke out in the period between 1880 and the mid-1940s were led by Sheikhs ... these rebellions, however, were intensely affected by the religious diversity of the Kurds.’¹¹² Moreover, it has been argued by some that the Kurdish practice of ‘settlement into independent tribes which act autonomously and have limited contacts with each other in conjunction with the lack of unifying supreme authority to keep them together’ has contributed greatly to the heterogeneity of the Kurds.¹¹³ Entessar is of the opinion that the heterogeneity of the Kurds is threefold:

First, the rugged, mountainous terrain of Kurdistan has historically impeded communication between Kurdish tribes and clans. Second, the absence of a strong, centralized administrative structure to unify the many rival Kurdish groups encouraged the development of diverse languages among the Kurds. Finally, the emergence in the twentieth century of a sovereign nation-state system in the Middle East further fragmented the Kurds and placed them under the jurisdiction of countries which themselves displayed linguistic diversity.¹¹⁴

2.1.2 Division of Kurdistan

Less is heard of the Kurds during the Mongol and Turkoman periods (1258-1509).¹¹⁵ It was in the early sixteenth century that the Kurds became an important pawn in the Persian-Ottoman conflict.¹¹⁶ On 23rd of August 1514, with the assistance of the Kurds, Sultan Selim’s Ottoman army defeated the forces of Shah Ismail Safavid at *Chaldiran*, north-west of Lake *Urmiah* which marks the first division of the Kurdish territory between Persia and the

¹¹⁰ According to Everest, ‘from 1600 to World War I, the Kurds resided in “Greater Kurdistan” which consisted of North Iraq, West Iran, East Turkey and the North East of Syria’; Larry Everest, ‘Oil, Power and Empire: Iraq and the US Global Agenda’, 4th ed., 2004, p. 46.

¹¹¹ M. Charountaki, ‘the Kurds and US Foreign Policy: International Relations in the Middle East’, Routledge, 2011, p. 36.

¹¹² Lokman I. Meho, ‘the Kurds and Kurdistan: a Selective and Annotated Bibliography’, Greenwood Press, 1997, p. 5.

¹¹³ See P. J. Kreyenbroek and S. Sperl (ed.), ‘The Kurds: a Contemporary Overview’, Routledge, 1992, p. 11

¹¹⁴ N. Entessar, ‘The Kurdish Mosaic of Discord’, *Third World Quarterly* 11, no. 4 (October 1989) 86.

¹¹⁵ C.J. Edmonds, ‘Kurdish Nationalism’, *Journal of Contemporary History*, 6, no. 1 (1971), p. 87.

¹¹⁶ Entessar, ‘Kurdish Ethnonationalism’, op. cit., p. 15.

Ottoman Empire.¹¹⁷ The main reason for the Kurds to support the Ottomans was the fact that they both were advocates of Sunnism against the Shi'i Persians which eventually resulted in setting the boundaries between the respective kingdoms through the Zuhab Agreement (Peace of Qasr-e-Shirin), May 17 1639.¹¹⁸ The aforesaid Kurdo-Ottoman Pact formally recognized sixteen independent principalities of various sizes, about fifty *sanjaks* (fiefdoms) and a number of Ottoman *sanjaks*.¹¹⁹ In fact, due to the fighting prowess of the Kurds both the Ottomans and Persians used the Kurdish populated regions as buffer zones dividing their respective empires as well as competing spheres of interest among different Kurdish groupings.¹²⁰ Indeed, in order to contain possible Kurdish rebellions this policy of divide and rule was very much in evidence in the *modes operandi* of the Persian monarchs.¹²¹ Nonetheless, the establishment of the hegemony of the Ottomans over the Kurds in the following centuries had a profound effect upon the social structure of Kurdistan, resulting in emergence of semi-autonomous emirates, or principalities as well as major Kurdish landowners.¹²² Furthermore, in spite of centralized policy of both Empires a series of semi-independent Kurdish principalities flourished well into the first half of nineteenth century.¹²³ However, it has been noted that the transformation of the Kurdish organizational structure from a traditionally tribal to a feudal system in which only a few privileged families owned most of the land, on the one hand exacerbated divisions among the various dominant Kurdish families and on the other was a setback for the Kurdish national sentiment.¹²⁴

2.1.3 The roots of Kurdish nationalism

It has been argued that Kurdish nationalism is a new phenomenon and a product of modernity which coincided with the emergence of Arab and Turkish nationalism in the Middle East in

¹¹⁷ A.R. Ghassemlou, 'Kurdistan in Iran', in G. Chaliand (ed.) translated by Michael Pallis, 'People without a Country: the Kurds and Kurdistan', Zed Press, 1980, p. 117.

¹¹⁸ The said Peace Treaty between Sultan Murad and Shah Abbas, effectively designating the Kurdish regions to Safavid and Ottoman Empires, A.R. Ghassemlou, 'Kurds and Kurdistan', op. cit., pp. 36-38.

¹¹⁹ These 17th century fiefdoms have been mentioned in the work of Professor Serefettin Turan, 'Yuzyilda Osmanli Imparatorlugunun idari taksimati (Administrative boundaries of the 17th Century Ottoman Empire) Attaturk Universitesi, 1961, Yilligi, (Ankara, 1963), pp. 205-07 cited in M. Kendal, 'the Kurds under the Ottoman Empire', G. Chaliand (ed., translated by Michael Pallis), 'People without a Country: the Kurds and Kurdistan', Zed Press, 1980, p. p. 22.

¹²⁰ Entessar, 'Kurdish Ethnonationalism', op. cit., p. 3.

¹²¹ For example see J.R. Perry, 'Karim-Khan Zand: A History of Iran, 1747-1779', Chicago U.P., 1979, pp. 184-194.

¹²² D. Natali, 'the Kurds and the State: Evolving National Identity in Iraq, Turkey and Iran', Syracuse U.P., 2005, p. 6.

¹²³ Edmonds, 'Kurdish Nationalism', op. cit., p.87.

¹²⁴ J. Ciment, 'The Kurds: the State and Minority in Turkey, Iraq and Iran', New York, 1996, p. 40.

the aftermath of the Ottoman Empire.¹²⁵ Kurdish nationalism emerged according to some scholars as a consequence of the collapsing Ottoman Empire during and after World War I.¹²⁶ Nonetheless, sense of Kurdish identity did not find written expression until in the poem of the seventeenth century poet Ahmad-i Khani entitled, *Mem-u-Zin* (the Kurdish *Romeo and Juliet*).¹²⁷ Kurdish nationalistic sentiments started emerging in the latter part of nineteenth century, in step with other Muslim peoples living under the ailing Ottoman Empire.¹²⁸ In its modern form according to Edmonds 'Kurdish nationalism developed during the second half of the nineteenth century along parallel lines with similar movements of the other subject races of the Ottoman Empire in Asia, the Arabs and the Armenians.'¹²⁹ It has also been linked with the abandonment of the Muslim concept of *Umma* (Islamic Nation) through which successive Ottoman Sultans kept the Kurdish population on their side since the Kurds were also Sunnis and shared a certain affinity with the Caliphate.¹³⁰ In order to reinforce this religious bond between the Kurds and the central government and mindful of possible designs in the remote and lawless Anatolia provinces, in 1891, Sultan Abdulhamid II authorised a tribal militia called *Hamidiye*,¹³¹ led by tribal chiefs with the sole purpose of ensuring the security of the territory against Armenian nationalism.¹³² According to Finkel, 'the Kurdish tribes were jealously independent, and forging them into a formal organisation would, he hoped, also serve to restrain their lawlessness and increase their loyalty to the distant government in Istanbul.'¹³³ Moreover, 'The *Hamidiye* Cavalry in the development of Kurdish nationalism 'was a necessary interlude in emergent Kurdish nationalism ... it contributed to feelings of solidarity among Sunni Kurds and offered leadership opportunities

¹²⁵ Abbas Vali, 'the Kurds and their Others': Fragmented Identity and Fragmented Politics', in 'the Kurds: Nationalism and Politics', *op. cit.*, p. 49.

¹²⁶ Hakan Ozuglo, 'Nationalism and Kurdish Notables in the Late Ottoman – Republican Era', *International Journal of Middle East Studies*, 33 (2001), 383-409, p. 383.

¹²⁷ McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 5.

¹²⁸ Hamit Bozarslan, 'Kurdish Nationalism in Turkey: From Tacit Contract to Rebellion (1919-1925)', in Abbas Vali, 'Essays on the Origins of Kurdish Nationalism', Mazda Publication, 2003, p. 165.

¹²⁹ Edmonds, 'Kurdish Nationalism', *op. cit.*, p. 89.

¹³⁰ Chaliand, 'Kurdish Tragedy', *op. cit.*, p. 27.

¹³¹ Olson opines: '... Creation of the Kurdish Light Cavalry was an effort to help realise his four major political objectives. It would tie the empire firmly to its Muslim roots and provide a defence against Russia and the Armenians, both increasingly aggressive after 1878, and the Kurds could be used as a balance against the Urban notables and provincial governments', Olson, 'the Emergence of Kurdish Nationalism', *op. cit.*, p. 8.

¹³² Ibid, According to Chaliand *Hamidiye* played an important role in the Armenian massacres of 1895 to 1896, officially disbanded after the Young Turks seized power in 1908; see also McDowall, 'a modern History of the Kurds', *op. cit.*, p. 59-63; for *Hamidiye* Irregular Cavalry Regiments see S. Duguid, 'The Politics of Unity: *Hamidiye* Policy in Eastern Anatolia', *Middle Eastern Studies*, 9/2, 1973, pp. 139-155.

¹³³ C. Finkel, 'Osman's Dream: the History of Ottoman Empire, 1300-1923', John Murray Publishers, 2006, p. 502.

to many young Kurdish men. The *Hamidiye* also provided many Kurds with knowledge of military technology and equipment and the capabilities to use it.¹³⁴

The best expression of Kurdish nationalism was the emergence of socio-political and literary organisations such as the publication of the newspaper, *Kurdistan*, in 1897.¹³⁵ The Young Turks Revolution of July 1908 had profound effects on the destinies of the peoples of the Ottoman Empire particularly the Kurds.¹³⁶ The Young Turks Revolution was followed by a honeymoon period between the Turks and the Kurds which resulted in for the first time in the public establishment of Kurdish nationalist organizations especially in the capital city of Istanbul.¹³⁷ The most important one of these organisations was the *Kurt Terraki ve Teavun Cemiyeti* (Kurdish Society for Progress and Mutual Aid), also known as *Kurdistan Taali ve Terraki Cemiyetti* (Society for the Rise and Progress of Kurdistan), which were founded by some of the most illustrious sons of famous Kurdish families.¹³⁸ Also, during this period a number of Kurdish literary and cultural clubs were created under the patronage of prominent Kurdish families in Mosul, Diyarbakir and Baghdad.¹³⁹ Nonetheless, the activities of the well-educated Kurdish intelligentsia during that period did not seem to make much of an impression on the majority of Kurds living in rural areas, as well as being viewed with suspicion by the Kurdish *Aghas* and *Khans* who considered them 'with hostility and suspicion as carriers of ungodly and revolutionary ideas.'¹⁴⁰ It has been noted that, 'in addition to the urban-rural dichotomy that undermined development of unified Kurdish nationalist organisations, intense rivalry among prominent feudal families also undermined Kurdish unity.'¹⁴¹ Nonetheless, in this period of openness the Kurdish nationalists managed to propagate their message among the ordinary populace through the *takiyas* (gathering places for specific religious order). Jwaideh opines that:

This was a development of great significance in the history of Kurdish nationalism. For a number of reasons, the importance of the *takiyas* as centres for dissemination of nationalist ideas can scarcely be exaggerated. The ideas emanating from these focal points found ready and wide acceptance among the Kurds, for they bore the stamp of authority of the Sheikhs.

¹³⁴ Olson, 'the Emergence of Kurdish Nationalism; *op. cit.*, p. 10.

¹³⁵ The newspaper appeared at intervals until 1902 in Cairo, Geneva, London and of all unlikely places in Folkestone, Özoğlu, Hakan, 'Kurdish Notables and the Ottoman State: Evolving Identities, Competing Loyalties, and Shifting Boundaries', State University of New York Press, 2004, p. 122.

¹³⁶ Wadie Jwaideh, 'Kurdish Nationalist Movement', *op. cit.*, p. 102.

¹³⁷ Olson, 'the Emergence of Kurdish Nationalism', *op. cit.*, p. 15.

¹³⁸ Wadie Jwaideh, 'Kurdish Nationalist Movement', *op. cit.*, p. 104-5.

¹³⁹ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 82.

¹⁴⁰ Kinnane, 'the Kurds & Kurdistan', *op. cit.*, p. 25.

¹⁴¹ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 82.

Moreover, the religious character and influence of the Sheikhs gave the *Takiyas* relative immunity from interference and harassment by the authorities [the importance of this was clearly demonstrated in the Iranian revolution in the 1980s]. The Sheikhs, who as a class represented an important segment of the Kurdish elite, were ardent nationalists. Unlike the largely Turkified urban elite, they were closely associated with the Kurdish masses, and identified themselves with them. Furthermore, both by training and conviction they stood for the traditional Islamic state as opposed to the modern secular state envisaged by the Young Turks.¹⁴²

The political freedom which Kurdish nationalists enjoyed after the Young Turks Revolution did not last long mainly due to a series of conflicts resulting in deterioration of Turkish-Kurdish relations. The burgeoning Kurdish nationalism was influenced as a reaction to Armenian nationalism and ultimately the ever more aggressive Turkish nationalist agenda under Atatürk. Celadet Bedir Khan, one of the main figures at the forefront of Kurdish nationalism in 1920s and 1930s, wrote to Atatürk that Turkish nationalism, ‘made as many Kurds for us as it made Turks for you.’¹⁴³ Bozarslan is of the opinion that:

... During the last decades of the Ottoman Empire, both the Kurdish traditional elite and the emerging intelligentsia tried to define the boundaries of the Kurdish group as a distinct entity. The aim was both to prevent the formation of an Armenian state in the Eastern parts of the Empire, and also to avert direct Turkish rule in the region.¹⁴⁴

Also, he expresses the fact that ‘Kurdish nationalism was essentially cultural, and even when it formulated political aims, as it did in the Bitlis, Suleymaniye and Barzan revolts in 1914, it never ceased to be “Ottomanist” at least until the end of the World War I’.¹⁴⁵ Nevertheless, ‘until the twentieth century, the only model of unification for the Kurds remained membership of a movement instigated by a charismatic figure, a movement which would collapse the moment they disappeared.’¹⁴⁶ Indeed, a situation which has persisted throughout the twentieth century and beyond. At the heart of the development of Kurdish nationalist movement in the nineteenth century as a result of the gap left by the disappearance of the independent emirates (the reform of the *Tanzimat* period)¹⁴⁷ was the dominance of Sheikhs

¹⁴² Jwaideh notes that, ‘for a number of reasons, the importance of the Takiyas as centres for the dissemination of nationalist ideas can scarcely be exaggerated’, Wadie Jwaideh, ‘Kurdish Nationalist Movement’, *op. cit.*, p. 105.

¹⁴³ Emir Celadet Ali, Bedirxan, Bir KÜRT Aydinindan Mustafa Kemal’e Mektup, Istanbul: Doz Yayinlari 1992, p. 22, cited in Bozarslan, ‘Kurdish Nationalism in Turkey’, *op. cit.*, p. 166.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Chaliand, ‘Kurdish Tragedy’, *op. cit.*, p. 26; see also Edmonds, ‘Kurdish Nationalism’, *op. cit.*, pp. 88-89.

¹⁴⁷ See McDowall, ‘a Modern History of the Kurds’, *op. cit.*, p. 57.

and religious figures.¹⁴⁸ It is worth mentioning that with few exceptions almost all of the Kurdish nationalist leaders in the late nineteenth and early twentieth century were all sheikhs. However, the Kurdish revolts of the nineteenth century were not based on any political organization or clearly defined political program which is unusual in the Islamic world.¹⁴⁹ Therefore, ‘because Kurdish religion and tribal leaders had derived their authority from the twin institution of the Sultanate and Caliphate, the abolition of these institutions removed the temporal and spiritual basis of their legitimacy, which led the Turkish republic to outlaw all the manifestations of Kurdish identity.’¹⁵⁰ Proclamation of the Turkish republic in 1923 resulted in the end of what Serif Mardin calls the Ottoman tacit contract between the Sultan and the Kurds.¹⁵¹

The Kurds in response to the draconian measures established by the new Turkish Republic launched an insurgency in 1925 with the goal of establishing an independent homeland. The rebellion was brutally put down and its leaders hanged in public in the middle of the central square in Diyarbakir. In spite of this the Kurds embarked upon a series of uprisings culminating in another rebellion in 1937 resulting in Turkey adopting the policy of denying the very existence of the Kurdish identity, referring to them only as “mountain Turks”. As a result Kurdish language, culture and geographical place names were banned.

The rise of Sheikh Obeydullah to prominence in 1880 has been described as ‘the first stage of a greater consciousness of Kurdish nationalism’,¹⁵² and is of particular importance to this study since he launched transnational armed attacks upon both the Ottoman and Persian territories with the aim of establishing an independent Greater Kurdistan.¹⁵³ In July 1880, in a letter addressed to the British Vice-Consul in Başkale, he states:

The Kurdish nation is a people apart. Their religion is different (to that of others), and their laws and customs are distinct. They are known among all nations as mischievous and corrupt The chief and rulers of Kurdistan, whether Turkish or Persian subjects, and the inhabitants of Kurdistan (Christians) one and all are united and agreed that matters cannot be carried on this way with the two governments, and necessarily something must be done so that European governments having understood the matter

¹⁴⁸ Generally see M. Van Bruinessen, ‘Aghas, Sheikhs, and State: the Social and Political Structures of Kurdistan, Zed Books, 1992.

¹⁴⁹ Kendal, ‘the Kurds under the Ottoman Empire’, *op. cit.*, p. 26.

¹⁵⁰ Entessar, ‘Kurdish Ethnonationalism’, *op. cit.*, p. 83.

¹⁵¹ S. Mardin, *Türk Modernleşmesi, Makaleler 4*, Istanbul, İletişim Yayınevi, 1991, p. 108, cited in Bozarslan, ‘Kurdish Nationalism in Turkey’, *op. cit.*, p. 165.

¹⁵² R. Olson, ‘the Emergence of Kurdish Nationalism & the Sheikh Said Rebellion, 1880-1925’, Texas U.P., 1989, p.1.

¹⁵³ Entessar, ‘Kurdish Ethnonationalism’, *op. cit.*, p. 81.

shall enquire into our state ... We want our affairs to be in our hands.... Otherwise the whole of Kurdistan will take the matter into their own hands, as they are unable to put up with these continued evil deeds, and the oppression which they suffer at the hands of the two governments of impure intention.¹⁵⁴

It is worth noting that the offensive launched in October 1880, involved 80,000 Kurdish fighters which achieved early success by capturing territories within the Persian border.¹⁵⁵ But he was no match for the might of the Ottoman and the Persian armies who cooperated to quell Sheikh Obeydullah's uprising resulting in his subsequent arrest and exile to Mecca, where he lived until his death.¹⁵⁶ In respect to Sheikh Obeydullah's uprising it is noted that it heralded the emergence of twentieth century Kurdish uprisings with nationalistic, as opposed to feudalistic, tribal, or religious, overtones.¹⁵⁷ It is also of particular importance to this study that Sheikh Obeydullah's transnational armed operations for the first time since the division of Kurdistan in 1514, made the Kurdish nationalist movement for independence an international issue.¹⁵⁸ One of the Kurdish national organizations instrumental in Kurdish revolts in the aftermath of the emergence of Kemalist ideology and the abolition of the Caliphate in 1924 was *Ciwata Azadi Kurd* (Kurdish Freedom Society), later renamed *Ciwata Kweseriya Kurd* (Kurdish Independent Society), or *Azadi*, freedom or independence.¹⁵⁹ The Turks, who had only recently been fighting for their own self-determination, 'crushed the Kurds, who sought theirs. It is strange how a defensive nationalism develops into an aggressive one, and a fight for freedom becomes one for dominion over others.'¹⁶⁰

In terms of Kurdish revolts in Turkey after its creation as a modern state in 1923, lack of a cohesive national agenda among the divided Kurds played a major part in unsuccessful attempts of the Kurdish movements in relation to the armed struggle to internal and external factors. One of the most important factors was that the Kemalist ideology provided the state an intellectual framework and the capacity for mobilization strengthened by an ancient administrative and military tradition. Also, the great powers, France anxious to please

¹⁵⁴ A. Safrastian, 'Kurds and Kurdistan', the Harvill Press, 1948, 62-63; who quotes from Vice-Consul Clayton's report dated 11 July 1880, p. 7 (Turkey, no. 5, 1880); see also John Joseph, 'The Nestorians and their Muslim Neighbours: A Study of Western Influence on their Relations', Princeton U.P., 1961, pp. 109-110; Chaliand, 'Kurdish Tragedy', *op. cit.*, p. 26.

¹⁵⁵ Kendal, 'the Kurds under the Ottoman Empire', *op. cit.*, p. 24.

¹⁵⁶ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 81.

¹⁵⁷ Wadie Jwaideh, 'Kurdish National Movement', *op. cit.*, p. 75

¹⁵⁸ For international aspect of Kurdish invasion of Persia in 1880, see Jwaideh, 'Kurdish Nationalist Movement', *op. cit.*, p. 94, Olson, 'the Emergence of Kurdish Nationalism', *op. cit.*, p. 7.

¹⁵⁹ Olson, 'the Emergence of Kurdish Nationalism', *op. cit.*, p. 45; Martin Van Bruinessen, 'Agha, Shaikh and State', *op. cit.*, p. 373, 446-447.

¹⁶⁰ J.D. Eller, 'From Culture to Ethnicity to Conflict: an Anthropological Perspective on International Ethnic Conflicts, University of Michigan Press, 1999, p. 193.

Turkey, Britain not wishing to destabilise Iraq, remained deaf to the Kurdish demands. As far as the Kurds were concerned, Iran shared the same interest as Turkey which is best illustrated in the manner in which the two states collaborated to crush revolts by their Kurdish populations.

2.2 The Kurds, international law and the formation of the modern Middle East

2.2.1 A struggle for dominance: the Treaty of Sèvres

The World War I heralded the close of a dynamic and optimistic century, in which European Empires had ruled the world and European political ideas reigned supreme.¹⁶¹ The most important outcome of the 1919 Peace Treaty was the creation of the League of Nations.¹⁶² The emergence of the Kurdish issue in the international arena came to the fore at the end of the World War I, in the aftermath of fragmentation of the Ottoman Empire into the sphere of influence by the victorious Allied Powers.¹⁶³ Upon the defeat of the Central Powers in the World War I and the breakup of the Ottoman Empire the so-called ‘Sick Man of Europe’, resulted in the creation of a number of new nation-states. However, the main casualty of the post-First World War as the modern map of the Middle East was being drawn up was the realization of an independent Kurdish state.¹⁶⁴ The secret Sykes-Picot Agreement in 1916 was to pave the way for the penetration by the European powers into Ottoman Empire, as well as division of its territories into the sphere of influence and intended administrative control of the Allies mainly Britain and France.¹⁶⁵ Indeed, Sykes-Picot would become the basis of the 1920 Treaty of Sèvres,¹⁶⁶ which subsequently divided the Ottoman territory under the pretext of “Mandates,” with the explicit promise by the Allied Powers that the people of those territories will be given their independence when it is deemed that they were ready for

¹⁶¹ M.N. Shaw, ‘International Law’, Cambridge U.P., 6th ed., 2003, p. 30.

¹⁶² A. Nussbaum, ‘a Concise History of the Law of Nations’, McMillan, 1954, pp. 251-90.

¹⁶³ The Ottoman Empire was divided into the British red zone of Mesopotamia (Iraq) [from Kkanekin to Kuwait] and the Blue French zone which included Syria, Lebanon, and South East Turkey [North West Kurdistan]; Ghassemlou, ‘Kurdistan and the Kurds’, *op. cit.*, p. 65.

¹⁶⁴ Allain, ‘International Law in the Middle East’, *op. cit.*, p. 15

¹⁶⁵ The Russians were also represented, but the Bolshevik government refused to honour the treaty and revealed its existence; see also G. Simons, ‘Iraq: from Sumer to Saddam’, St. Martin’s Press, 2nd ed., 1994, p. 205.

¹⁶⁶ Treaty of Sèvres, 10 August 1920, Part II, Article 64; Treaty Series, No. 11 (1920) (Cmd. 964), 113 British and Foreign State Papers 652; extracted in M. Weller (ed.), ‘Iraq and Kuwait: Their Hostilities and their Aftermath’, Cambridge U.P., 1993, p. 568.

it.¹⁶⁷ This was in spite of the fact that in the Paris Peace Conference ‘Kurdistan’ had been considered as a nominally independent state that should fall under the Mandate System intended by Article 22 of the Covenant of the League of Nations.¹⁶⁸ Unfortunately for the Kurds, the Treaty of *Sèvres* was never implemented.¹⁶⁹ Only Greece ratified the Treaty and the provisions of the Treaty never became a reality.¹⁷⁰ But this was the first time in the Kurdish history that the issue of Kurdistan was discussed in an international arena.¹⁷¹ It is worth noting that at the Paris Conference the Kurds were not completely without representation. General Sherif Pasha, a high ranking Kurdish officer of the Ottoman Empire and the Turkish Ambassador to Stockholm, was dispatched to inform the Conference of his people’s demands, to no avail.¹⁷²

The fact that a Kurdish state did not emerge from the ruins of the Ottoman Empire was a clear indication that the much heralded notion of ‘self-determination’, championed by the American President Woodrow Wilson was no more than a political rhetoric that came a lowly second to the interests of the European powers.¹⁷³ From the outset, Wilson was of the opinion that the post-war boundaries of the Middle East should be decided upon his fourteen point program. Somewhat idealistically he spoke of ‘free, open-minded, and absolutely impartial adjustment of all colonial claims’ (point 12 of President Woodrow Wilson’s Program of the World Peace) that also encapsulated Kurdistan: ‘the Turkish portion of the Present Ottoman Empire should be assured a secure sovereignty, but the other nationalities which are now under Turkish rule should be assured an undoubted security of life and absolutely unmolested opportunity of autonomous development, [...]’.¹⁷⁴ In the treaty of *Sèvres* President Wilson’s Fourteen Point Programme for World Peace provided for the drafting of a scheme of local autonomy for the predominantly Kurdish areas lying east of the Euphrates, south of Armenia

¹⁶⁷ J. Ciment, ‘The Kurds: States & Minority in Turkey, Iraq & Iran, New York, 1996, p. 53.

¹⁶⁸ For a Brief Historical Account see: C. Trapp, ‘A History of Iraq’, Cambridge U.P., 2000, pp. 30-76; for the League of Nations Mandate system see: N. Bentwich, ‘the Mandate System’, Longmans, 1930, pp. 1-20; A. Anghie, ‘Imperialism, Sovereignty and the Making of International Law’, Cambridge U.P., 2004, pp. 115-195.

¹⁶⁹ H. Hannum, ‘Autonomy, Sovereignty, and Self-Determination: the Accommodation of Conflicting Rights’, Pennsylvania U.P., 1990, p. 183.

¹⁷⁰ M. Muller & S. Linzey, ‘the Internally Displaced Kurds of Turkey: On-going Issues of Responsibility, Redress and Resettlement’, Kurdish Human Rights Project, BAR Human Rights Committee of England and Wales’, p. 19 <<http://www.barhumanrights.org.uk/docs/bhrckhrp/ResponsibilityReport.pdf>>.

¹⁷¹ M.T. O’Shea, ‘Trapped Between the Map and Reality: Geography and Perceptions of Kurdistan’, Routledge, 2004, pp. 139-40.

¹⁷² Chaliand, ‘Kurdish Tragedy’, *op. cit.*, p. 51.

¹⁷³ A. Cassese, ‘Self-Determination of Peoples: A Legal Appraisal’, Cambridge U.P., 1995, p. 25.

¹⁷⁴ Edmonds, ‘Kurdish Nationalism’, *op. cit.*, p. 90.

and north of the frontier of Turkey with Syria and Mesopotamia.¹⁷⁵ Article 64 of the treaty states:

If within one year from the coming into force of the present Treaty the Kurdish people within the areas define ... shall address themselves to the Council of the League of Nations in such a manner as to show that a majority of the population in these areas desire independence from Turkey, and if the Council then considers that these people are capable of such independence and recommends that it be granted to them, Turkey hereby agree to execute such a recommendation and to renounce all rights and titles over such areas.

If and when such renunciation takes place, no objection will be raised by the Principles Allied Powers to the voluntary adhesion to such an independent Kurdish State of the Kurds inhabiting that part of Kurdistan which hitherto been included in the Mosul Vilayet.¹⁷⁶

However, the Kurds could not make the most of this window of opportunity to forge their own state due to the fact that the Treaty of Peace was never ratified by Turkey.¹⁷⁷ Moreover, there was no address to the Council as required, nor were there any substantial preparation for the necessary vote.

2.2.2 Treaty of Lausanne (1923): Creation of modern Turkey and Iraq

As the concept of nationalism gathered momentum among the Kurds as well as other peoples in the Middle East,¹⁷⁸ between the Treaty of *Sèvres* and the Treaty of *Lausanne* of 24 July 1923, the issue of the Kurds was completely overlooked. The Treaty of Lausanne settled the borders of modern Turkey, a notion introduced by the British, resulting in the claim by the Kurds of being betrayed, hence, dashing any hopes of an independent Kurdish state.¹⁷⁹ It appears that the emerging Kurdish movement had pinned its hopes too much on the

¹⁷⁵ Address to a Joint Session of Congress, 8 January 1918, Papers Relating to the Foreign Relations of the United States, 1918, Supplement 1: the World War (United States Government Printing Office, Washington, 1933), vol. I, at 12; Wilson's point 12 stated that non-Turkish minorities residing on the territory of the former Ottoman Empire should be 'assured of an absolute unmolested opportunity for autonomous development.'

¹⁷⁶ Treaty of *Sèvres*, 10 August 1920, Part II, Article 64; Treaty Series, No. 11 (1920) (Cmd. 964); 113 *British and Foreign and State Papers* 652; reproduced in Weller (ed.), *Iraq and Kuwait*, *op. cit.*, p. 568.

¹⁷⁷ Jean Allain, 'International Law in the Middle East: Closer to Power than Justice, Ashgate, 2005, p. 18.

¹⁷⁸ According to Wright nationalism suggests a condition of public opinion within a group which constitutes it a nation state, which motivates its definition of legal nationality, and which accounts for its maintenance of cultural nationality. It is a socio-psychological force which varies in intensity and which may be measured, Q. Wright, 'A Study of War', Chicago U.P., 2nd ed., 1965, p. 998.

¹⁷⁹ E. Turlington, 'the Settlement of Lausanne', *AJIL*, 18, no. 4, Oct 1924, 702.

Wilsonian conception of self-determination..¹⁸⁰ Nonetheless, Allain contributes various factors to purging the notion of a Kurdish state from the international discourse:

... Foremost among which was the retreat of the United States from the international system conceived by its president; the British and French infighting over the spoils of war, and finally, the rise of the Kemalist Turkey ... would converge to dissipate the move toward the creation of Kurdistan. Not to be out of the equation was the lack of a nationalist movement within Kurdistan that could effectively demonstrate a unity of purpose, both in governing the Kurdistan region and in articulating its claims internationally to the European Powers.¹⁸¹

According to the Lausanne Treaty most of the Kurdish territory was given to Turkey. But crucially, the Treaty made no mention of the Kurds nor were there any mention of their national rights. Nevertheless, there were a few provisos regarding the “protection of minorities”, which specifically referred to non-Muslim minorities in Turkey such as Armenian, Greeks and the Jewish population.¹⁸²

As a result of this development the majority of the Kurdish population of the Middle East found themselves dispersed over the modern states of Turkey, Iraq, Iran and Syria, the four most powerful political entities in Western Asia.¹⁸³ It is worth noting that the unambiguous interference of Allied Powers contributed greatly to the internationalisation of the Kurdish issue. However, the transition of the Kurdish issue from singularity to plurality perfectly demonstrates the complexity of this issue.¹⁸⁴

The withdrawal of the United States from the international post-World War I peace process was detrimental to the realisation of a Kurdish state, since initially they had shown interest in undertaking the Mandate of the ‘Greater Kurdistan’.¹⁸⁵ With the US out of the equation Great Britain, an early supporter of the independent Kurdistan was left to fill the void but was unwilling to take on the financial and military burden of acting as a mandatory power of a ‘Greater’ Kurdistan. Great Britain opted to slowly dismember it with the aim of retaining the

¹⁸⁰ As clearly illustrated in the pages of *Jin*, the official publication of the League of Progress of Kurdistan published in Constantinople from 1918 to 1920. See Anthony Whelan, ‘Wilsonian Self-Determination and the Versailles Settlement’, *ICLQ*, vol. 43, 1994, pp. 99-115.

¹⁸¹ Jean Allain, ‘International Law in the Middle East’, *op. cit.*, p. 16.

¹⁸² Articles 40-45 specify that the minorities in question are “non-Muslim minorities”, League of Nations Treaty Series, vol. 28, pp. 12-113.

¹⁸³ Kendal, ‘Kurdistan in Turkey’, *op. cit.*, p. 51.

¹⁸⁴ M. Charountaki, ‘the Kurds and US Foreign Policy’, *op. cit.*, p. 41.

¹⁸⁵ See minutes of the meeting of the ‘Council of Ten’ of the Paris Peace conference, stating the aims of Great Britain in Salah Jmor, ‘*L’Origine de la question Kurde*, 1994, p. 96, n. 123; trans. Jean Allain, ‘International Law in the Middle East, *op. cit.*, p. 16.

oil rich *Vilayet* of Mosul.¹⁸⁶ It goes without saying that discovery of oil in the *Vilayet* Mosul played a huge part in adding the said region to the newly formed state of Iraq.¹⁸⁷ Britain initially espoused the creation of an independent Kurdish state mainly to be used as a buffer zone between Mesopotamia (under its Mandate) and the newly formed Turkey as well as the Bolshevik Russia. As the importance of the issue of oil became clear it slowly abandoned the Kurdish aspirations in the move toward the final settlement of a dismantled Ottoman Empire.¹⁸⁸ In the case of Iraq, in order to appease the restless Kurds, Britain supported the enshrinement of cultural rights of the Kurdish population in its constitution which also proved fruitless. Having been denied a state in Paris, having been promised autonomy with the possibility of statehood at *Sèvres*, Kurds would, when the smoke cleared at Lausanne, be granted limited cultural rights and administrative control in the Northern *Vilayet* of Mosul.”¹⁸⁹ These limited gains would soon vanish once the dust had settled and the *Real politik* prevailed at the expense of an independent Kurdish state. The Wilsonian conception of self-determination, as a political ambition, was a mere rhetoric where the Kurds were concerned and by and large imperial powers did as they saw fit in order to protect their vital interests. Nevertheless, the biggest impact was felt by the Kurds in Turkey where international pledges incorporated in the Treaty of Lausanne were never invoked,¹⁹⁰ not to

¹⁸⁶ Allain states that early in the process Lloyd George the British Premier “... persisted in seeking the establishment of a Kurdish state, not for reason of affinity towards any Kurdish nationalist movement but for reasons of geopolitics. Britain saw in the creation of Kurdistan a buffer state between Turkey and Russia on the one hand and Mesopotamia on the other.”; Allain, ‘International Law in the Middle East’, *op. cit.*, p. 17.

¹⁸⁷ Iraq unlike the landlocked Kurdistan had access to the Persian Gulf which made the transportation of oil a lot easier. McDowall, ‘A Modern History of the Kurds’, *op. cit.*, pp. 135 & 143.

¹⁸⁸ Allain, ‘International Law in the Middle East’, *op. cit.*, p. 22.

¹⁸⁹ Ibid.

¹⁹⁰ According to section III of the Lausanne Treaty of 24th July 1923 (Articles 37-44) protection of the rights of minorities was definitely recognised as the responsibility of the Turkish government. But these articles concern the religious minorities of Jews and Christians; Kurds are not included, however, a provision of Article 39 relates to the Kurdish minority:

[...] No restrictions shall impose on the free use by any Turkish national of any language in private intercourse, in commerce, religion, in the press, or in publications of any kind or at public meetings.

Notwithstanding the existence of the official language, adequate facilities shall be given to Turkish nationals of non-Turkish speech for the oral use of their own language before the courts.

Article 44 was to act as guarantee for the above provisions which says in part:

[...] Turkey agrees that any Member of the Council of the League of Nations shall have the right to bring to the attention of the Council any infraction or danger of infraction of any of these obligations, and that the Council may thereupon take such action and give such directions as it may deem proper and effective in the circumstances.

Turkey further agrees that any difference of opinion as to questions of law or of fact arising out of these Articles between the Turkish Government and any one of the other Signatory Powers or any other Power, a member of the Council of the League of Nations, shall be held to be a dispute of an international character under Article 14 of the Covenant of the League of Nations. The Turkish Government hereby consents that any such dispute shall, if the other party thereto demands, be referred to the Permanent Court of International Justice. The decision of the Permanent Court shall be final and shall have the same force and effect as an award under Article 13 of the Covenant.

mention subjecting its Kurdish population to full-scale repression as a means of implementation of the policy of “Turkification” of what remained of the Ottoman Empire.¹⁹¹

2.2.3 The Permanent Court of International Justice and the Vilayet of Mosul

The Treaty of Lausanne also set out a procedure to finalise the demarcation of the border of Turkey and Iraq but it proved rather contentious during the negotiation, principally because of Turkey claiming a title to the largely Kurdish *Vilayat* of Mosul in Northern Iraq.¹⁹² It was eventually decided to allow the Treaty to be concluded under the proviso that Britain and Turkey will continue negotiation and if no agreement was reached nine months after the entry into force of the Treaty, they would refer the case to the Council of the League of Nations.¹⁹³ By the summer of 1924, negotiations had broken down and the case was referred to the League Council by the United Kingdom and an Advisory Opinion was sought from the Permanent Court.¹⁹⁴ The Permanent Court held that the decision of the Council under the Treaty of Lausanne was to ‘be binding on the parties and [would] constitute a definitive demarcation of the frontier between Turkey and Iraq’.¹⁹⁵ On 16 July 1925, a Commission of Enquiry awarded the territory south of the Brussels Line (so-called because drawn by the League Council at Brussels, 29 October 1924) to Iraq, subject to two important conditions: (i) the territory must remain under the effective mandate of the League of Nations for a period which may be put at twenty-five years; (ii) Regard must be paid to the desires expressed by the Kurds that officials of Kurdish race should be appointed for the administration of their country, the dispensation of justice, and teaching in the schools, and the Kurdish should be the official language of all these services.¹⁹⁶

¹⁹¹ Allain, ‘International Law in the Middle East’, *op. cit.*, p. 22.

¹⁹² See generally, Quincy Wright, ‘The Mosul Dispute’, *AJIL*, vol. 20, No. 3 (Jul. 1926), pp. 153-164.

¹⁹³ The Treaty of Lausanne in Section III, Article 3(2): ‘The frontier between Turkey and Iraq shall be laid down in friendly arrangement to be concluded between Turkey and Great Britain within nine months from the coming into force of the present Treaty. In the event of no agreement being reached between the two Governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations. The Turkish and British Governments reciprocally undertake that, pending the decision to be reached on the subject of the frontier, no military or other movement shall take place which might modify in any way the present state of the territories of which the final fate will depend upon that decision.’

¹⁹⁴ For the background to the case, see the advisory opinion of 21 November 1925 of the Permanent International Court of Justice, Interpretation of the Article, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, PCIJ Series B, No. 12 (1925), 9-18. Turkey contested the binding nature of the decision stating that ‘the only possible procedure’ was ‘to reach a solution with the consent of the Parties through the good offices of the Council.’

¹⁹⁵ The Court held that the decision taken must be unanimous, excluding the votes of the interested parties.

¹⁹⁶ See League of Nations Council Decision Relating to the Turco-Iraq Frontier, Geneva, 16 December 1925, LN Doc. A.17.1932.VII (League of Nations Official Journal, 7th year, No. 2 (Feb. 1926) 191-192); Hudson, *International Legislation*, vol. 1 (1973); reproduced in M. Weller (ed.), ‘Iraq and Kuwait, *op. cit.*, p. 571.

Turkey challenged the decision, insisting on the reinstatement of *de facto* Turkish sovereignty, promising Britain the exclusive oil exploitation rights. Britain was not interested.¹⁹⁷ The Council adopted its final decision on 16 December 1925, favouring a solution recommended by the Commission, and demarcated the boundary between Iraq and Turkey along 'Brussels' line and invited the British Government to come up with a new treaty with Iraq to ensure continuance of the Mandate for a further 25 years.¹⁹⁸ The decision of the Council also called upon the United Kingdom to implement the recommendations of the Commission of Enquiry 'to [secure] for the Kurdish populations ... the guarantees regarding local administration recommended by the Commission in its final conclusions.'¹⁹⁹ Furthermore, by the tripartite Treaty of Ankara in June 1926, Turkey finally renounced its sovereignty over the *Vilayet* of Mosul.²⁰⁰

The end of the First World War also coincided with the Bolshevik Revolution in Russia in October 1917 which had a lasting impact on the international relations and perhaps played a minor role in the formation of the modern Middle East, in spite of its great impact on the national aspirations of the non-Turkish nationalities.²⁰¹ According to Kendal 'the Allies, who for a while had feared that the movement led by Mustafa Kemal might be an offshoot of Soviet Revolution, were effectively reassured.'²⁰² This fear was justified since the Soviet Revolution had played a part in the eventual Turkish victory through withdrawing its claims from the former Ottoman territories because of the on-going civil war in Russia. Also, later on the Soviet Union had provided *kemalists* with greatly needed material and moral support since the friendship of a strong nationalist Turkey ensured protection of its southern flank.²⁰³ It has been argued that in the Paris Conference as a reaction to the communist menace the Allied Powers sought to establish a *cordon Sanitaire* to separate the Soviet Union from the rest of Europe as well as other territories in which they had vital interest such as the oil rich states in the Middle East.²⁰⁴

¹⁹⁷ McDowall, 'A Modern History of the Kurds', *op. cit.*, p. 146.

¹⁹⁸ The new Treaty between Great Britain and Iraq was concluded on 13 January 1926: Treaty between the United Kingdom and Iraq regarding the Duration of the Treaty of 10 October 1922, Baghdad, 13 January 1926; 123 British Foreign and State Papers 446; 'Treaty Series, No. 10 (1926)' (Cmd. 2662).

¹⁹⁹ Eague of Nations Council Decision Relating to the Turco-Iraq Frontier, Geneva, 16 December 1925, (para. 3), reproduced in Weller, 'Iraq and Kuwait' *op. cit.*, p. 572.

²⁰⁰ Edmonds, 'Kurdish Nationalism', *op. cit.*, p. 90.

²⁰¹ Saad Eskander, 'Britain's Policy in Southern Kurdistan: the Formation and Termination of the First Kurdish Government, 1918-19, *British Journal of Middle Eastern Studies*, Vol. 27, No. 2, 2000: 129-63, p. 142.

²⁰² Kendal, 'the Kurds under the Ottoman Empire', *op. cit.*, p. 22.

²⁰³ Louis Fischer, 'the Soviets in the World Affairs: a History of Relations between the Soviets and the Rest of the World', Vintage Books, 1960, 1:391-92.

²⁰⁴ With respect to British foreign policy towards the Soviet Union in that period see G.H. Bennett, 'British Foreign Policy of the Curzon Period: 1919-1924', Palgrave MacMillan, 1995, pp. 41-60; also see K. Neilson,

The Allied Powers facilitated the emergence of nationalistic regimes which were to form a sort of quarantine belt against the Soviet red virus.²⁰⁵ In regards to the Kurds the emergence of quasi-military regimes in Turkey under Mustafa Kemal and Reza Khan (later Reza Shah) in Iran are of particular importance to this study since at the heart of their agendas was the policy to forge national identities at the expense of other ethnic and religious minorities such as their Kurdish populations.²⁰⁶ This is in light of the fact that both newly established regimes in Turkey and Iran due to instability had initially inferred that they may tolerate autonomous Kurdish regions within their unitary systems and yet, as soon as they established themselves especially militarily they reneged on those ideas.²⁰⁷

2.3 The Kurds in Turkey: 1923-1945

2.3.1 Living under the Kemalist regime

It has been argued that injustices experienced by the Kurds in other states are nothing compared to the brutality endured by the Kurds in Turkey.²⁰⁸ As noted above, the modern state of Turkey was established in the aftermath of the World War I, by Mustafa Kemal, dubbed *Kemal Atatürk*, “Father of the Turks,” a westernized military officer from Salonika (now Thessaloniki, Greece). The emergence of modern Turkey heralded an era of intense Turkish nationalism, at the expense of other minorities in that country especially the Kurds.²⁰⁹ But Atatürk’s attitude towards the Kurds was rather ambiguous to begin with. Since initially he carried on the traditional Ottoman policy to strengthen its rule over the Kurdish territory rather than “Turkification” of the Kurdish population.²¹⁰ It is worth noting that in the aftermath of the Ottoman defeat in the World War I, the Kurdish population of Anatolia had rallied to the Islamic cause in the Turkish War of Independence (1919-1923) in order to preserve the Islamic state. Atatürk had convinced the Kurdish Chieftains that the only way to

‘The Foreign Office and the Defence of Empire: 1919-1939’, in G. Kennedy (ed.), ‘Imperial Defence: the Old World Order: 1856-1956’, Routledge, 2008, pp. 30-49.

²⁰⁵ E. Hobsbawm, ‘Age of Extremes, London: Abacus, 1994, p. 67.

²⁰⁶ For an in depth analysis, see T. Atabak & E.J. Zürcher, ‘Men of Order: Authoritarian Modernisation under Atatürk & Reza Shah, 1918-1942, I.B. Tauris, 2004.

²⁰⁷ A.C. Diener, ‘Borderlines and Borderlands: Political Oddities of the Edge of the Nation State’, Rowman & Littlefield, 2009, p. 113.

²⁰⁸ McDowall, ‘A Modern History of the Kurds’, *op. cit.*, p. 184.

²⁰⁹ N. Entessar, ‘Kurdish Ethnonationalism’, Lynne Rienner Publishing, 1992, p.81; on Turkish nationalism see generally H. Poulton, ‘Top Hat, Grey Wolf and Crescent: Turkish Nationalism and the Turkish Republic’, New York U.P., 1997.

²¹⁰ Chaliand, ‘the Kurdish Tragedy’, *op. cit.*, p. 29.

escape the dominance of the Arminian hegemony or the British Protectorate was to “fight alongside other Muslims for the creation of a Muslim state under the spiritual guidance of a Caliph”. He called upon ‘all Muslim Elements’, meaning Turks and Kurds for ‘complete unity in struggle to expel the invaders from the Muslim Fatherland’.²¹¹ However, Atatürk was careful not to reveal his true nationalistic intentions and between 1919 and 1923 he continued this tactical alliance with the Kurds. It allowed Turkey to maintain six *vilayets* populated mainly by the Kurds but claimed by Armenians.²¹² The Kurds had taken an active part in the forces commanded by Atatürk driving the British, French and Greeks (including ethnic Greeks living in south-western Anatolia) from the country by 1923.²¹³ Even prior to the signing of the Treaty of Lausanne in regards to the Turkey’s Kurdish population, Atatürk had said: ‘whichever provinces are predominantly Kurd will administer themselves autonomously’.²¹⁴ However, ominously for the Kurdish aspirations, he later announced: ‘apart from that, we have to describe the people of Turkey together. If we do not describe them thus, we can expect problems particular to themselves ... it cannot be correct to try to draw another border [between Kurds and Turks]. We must make a new programme.’²¹⁵ On this crucial point Mango notes that ‘any kind of provincial self-government would have been an obstacle to his designs, particularly self-government in what he, along with the entire Turkish elite, considered to be a backward region.’²¹⁶

The true intention of Atatürk was to create a unitary Turkish national identity based on denial of any ethnicity other than Turkish. In 1922 the newly established Grand National Assembly abolished the Sultanate and established the modern Turkish Republic under Atatürk.²¹⁷ Furthermore in 1924, Atatürk abolished the concept of Caliphate, and more importantly eradicated any Islamic ideological point which had previously been the rallying point around which the Turks and the Kurds had united to rid Turkey of Greek and Armenian threats.²¹⁸

²¹¹ M. Kendal, ‘Kurdistan in Turkey’, in G. Chaliand, ‘People without a Country: the Kurds and Kurdistan’, *op. cit.*, p. 55.

²¹² Chaliand, ‘The Kurdish Tragedy’, *op. cit.*, p. 29.

²¹³ D. McDowall, ‘The Kurds: a Nation Denied’, Minority Rights Group (1 August 1991),

²¹⁴ Statement made in reply to a journalist, Emin, in Izmit, reprinted in McDowall, ‘a Modern History of the Kurds’, *op. cit.*, p. 190.

²¹⁵ Allain, ‘International Law and the Middle East’, *op. cit.*, p. p. 23; see also McDowall, ‘a Modern History of the Kurds’, *op. cit.*, p. 190.

²¹⁶ Andrew Mango, ‘Atatürk and the Kurds’, *Middle Eastern Studies*, Vol. 35, No. 4, Seventy-Five Years of the Turkish Republic (Oct., 1999), p. 19.

²¹⁷ The Sultanate was abolished on 30 October 1922, and the Republic was officially proclaimed about a year later, on 29 October 1923, Tugrul Ansay & D. Wallace, Jr. (ed.), ‘Introduction to Turkish Law’, Kluwer Law International, 5th ed., 2004, p. 21

²¹⁸ ‘He led a war of independence on behalf of non-Arab Muslims of the Ottoman Empire against the French, Greeks and Armenians, who staked competing claims for parts of the former Ottoman territories’; Muller & Linzey, ‘the Internally Displaced Kurds of Turkey’, *op. cit.*, p. 19.

Once the Kemalist Republic was formed and consolidated upon signing of the Lausanne Treaty in 1923, Atatürk began a Turkification process that included, among other things, the banning of all Kurdish schools, associations, publications and other forms of cultural expression.²¹⁹ Indeed, Atatürk's vision was based on denying and destroying any aspect of the Kurdish identity in order to create a mono-ethnic secular state.²²⁰ Consequently, the Turkish government coined the term "Mountain Turks" to refer to the country's Kurdish population as well as replacing the Kurdish names of over 20,000 settlements with Turkish names.²²¹ İsmet İnönü, one of Atatürk's most loyal supporters and the former Turkish Prime Minister has encapsulated the Kemalist policy: 'only the Turkish nation is entitled to claim ethnic and national rights in this country. No other element has any such rights.'²²² This point was very much reiterated in September 1930 by Mahmut Esat Bozurt that: 'we live in a country called Turkey, the freest country in the world ... I believe that the Turks must be the only lord, the only master of this country. Those who are not of pure Turkish stock can have only one right in this country, the right to be servants and slaves.'²²³ Therefore, it is understandable that the status of the Kurds in Turkey has been a lot more precarious compared to the Kurds in Iran and Iraq in which their ethnic identity and equality are enshrined in law.²²⁴ This was indeed a radical change in Kemalist thinking by clearly embarking on a racial policy which proposed to expunge all non-Turkish expressions.²²⁵

2.3.2 Legal measures against the Kurds in Turkey

As discussed above, the Treaty of Lausanne attempted to include provisions to protect the cultural rights of minorities in modern day Turkey. In the aftermath of this treaty, 75 Kurdish Deputies held seats in the National Assembly in Ankara.²²⁶ But from March 1924, speaking or publishing in Kurdish were banned and the Constitution of the same year reiterated the Kemalist vision of a strictly *Turkish* Turkey, upon which the Turkish government has pursued

²¹⁹ Meho, 'The Kurds and Kurdistan: a General Background', *op. cit.*, p.13.

²²⁰ 'Kemal's Secularism is rooted in the antireligious tradition of the radical Jacobin-style left that emerged after the French Revolution', Ernest Gellner, 'Encounter with Nationalism', Oxford: Blackwell, 1994, pp. 81-91.

²²¹ Muller & Linzey, 'the Internally Displaced Kurds of Turkey', *op. cit.*, p. 21.

²²² Quoted in Kendal, 'Kurdistan in Turkey', in Chaliand, 'People Without a Country', p. 65.

²²³ Ibid, pp. 65-66.

²²⁴ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 81.

²²⁵ McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 192.

²²⁶ Chaliand, 'Kurdish Tragedy', *op. cit.*, p. 30.

a policy of forced assimilation of the Kurds.²²⁷ Article 69 of the Turkish Constitution of 1924 is unequivocal in setting out the policy of assimilation. It says: 'All Turks are equal before the law and are obliged to respect the law. All privileges of whatever description claimed by classes, families and individuals are abolished and forbidden.'²²⁸

As part of his nationalistic and secular agenda Atatürk abolished the Caliphate, and introduced the secular 'Law on the Unification of Education'.²²⁹ Hence, resulting in the closure of the religious schools, the *madrasas* and *kuttabs*, he removed the last remaining source of education for many Kurds in the rural areas.²³⁰ Moreover, this action alienated many Kurds who had helped his forces through the tumultuous period of the Turkish War of Independence (1919-1923).²³¹

On 8 December 1925, the Ministry of Education issued a circular banning the use of such decisive terms as Kurds, Circassian and Laz, Kurdistan and Lazistan.²³² In 1930, Mustafa Kemal approved the publication entitled: the Outline of Turkish History (*Türk Tarihinin Ana Hatları*), formulated the Turkish historical thesis, that claimed many if not most of civilizations including the Medes, whom the Kurds consider as their ancestors, as well as the Achaemenians and Parthians are related to Turkish origin.²³³ However, there was a particular insistence on cultural hegemony which could be traced to views advanced by Ziya Gökalp, one of the leading ideologists of Turkish nationalism.²³⁴ According to Gökalp the term 'nation' means 'a group of people who have the same education, [and] have received the same acquisitions in language, religion, morality and aesthetics, rather than [who share] a common ethnicity'.²³⁵ In his seminal book 'the Principles of Turkism', he did not deny the existence of other ethnic groups within the Turkish nation but gave privilege to Turkish

²²⁷ J. Blau, 'Refinement and Oppression of Kurdish Language', in 'the Kurds: Nationalism and Politics', *op. cit.*, p. 109.

²²⁸ Article 69 of the Turkish Constitution of 1924, <http://www.bilkent.edu.tr/~genckaya/1924constitution.pdf>

²²⁹ Kemal Kirisci & Gareth Winrow, 'the Kurdish Question and Turkey: an Example of Trans-State Ethnic Conflict', Routledge, 1997, p. 95

²³⁰ McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 192; Although Islam was declared as the religion of the state and creating a Ministry of Religious Affairs in 1924 Constitution, in the 1935 Amendment these provisions were left out since at that time it was claimed by the state that the equality of all citizens factually and legally was established, see Yilmaz M. Altug, 'Turkey and some Problems of International Law', Yenilik Basimevi: Istanbul, 1958, p. 146.

²³¹ Ibid, According to McDowall, 'these were the religiously-minded, the Shaykhs and the old Hamidiya Aghas who had genuinely believed in the defence of the Caliphate'.

²³² Sami Ozerdim, Atatürk Devrimi Kronolojisi [Chronology of Atatürk's Reforms] (Ankara, 1996), p. 93; see also M. Kendal, 'Kurdistan in Turkey', *op. cit.*, p. 55.

²³³ A title reminiscent of Atatürk's favourite history book, 'the Outline of History' by H.G. Wells. Andrew Mango, 'Atatürk and the Kurds', *op. cit.*, p. 20.

²³⁴ Mango states that the Turkish nationalism under Atatürk was very much influenced by the French model where Bretons, Occitanians, Savoyards, Flemings, etc. had all been assimilated to French culture, *ibid*, p. 21.

²³⁵ Omer Taspinar, 'Kurdish Nationalism and Political Islam in Turkey: Kemalist Identity in Transition', Routledge, 2005, pp. 28, 50.

culture over other ethnic cultures.²³⁶ By the mid-1930s it was forbidden to even mention the words “Kurds” and “Kurdistan”. Meiselas notes:

Turkish identity was no longer a matter of choice; the Kurds were taught that they were Turks even by racial origin, and they had to be referred to as “Mountain Turks” ... their language (which is related to Persian) was declared a Turkish dialect with some Persian influence-but speaking it was forbidden.²³⁷

For the Kurds, the right of association was in practice banned by law no. 765 published in the official journal of the Turkish Republic on 3 March 1926, Article 141 and 141 contain the key provisions.²³⁸ Furthermore, the policy of Turkification continued throughout 1920s and 30s, for instance, the Turkish Penal Code enacted in 1926 prohibited organisations and propaganda seeking to destroy or weaken nationalist feelings which was broadly interpreted by the judiciary to usurp any expression of Kurdish identity.²³⁹ However, the most draconian manifestation of this policy of forced assimilation was the Law of Resettlement (Law 2510) enacted in 1934, that divided Turkey into four different zones meant to assimilate Kurds by forced migration to predominantly Turkish speaking areas, while making off-limit settlement to other areas of the country, as well as establishing a zone designated as being ‘closed for security reasons to any form of civilian settlement’.²⁴⁰ Yet, according to McDowall the main purpose of the Settlement Law was to spread the Kurdish population, ‘to areas where it would

²³⁶ Ziya Gökalp, ‘Principles of Turkism’(Ankara, 1920, trans. Robert Devereux, Leiden, 1968), pp. 12-15

²³⁷ S. Meiselas, ‘Kurdistan: In the Shadow of History’, Chicago U.P., 2nd edition, 1997, p. 224.

²³⁸ ‘Article 141-4: ‘Any attempt, on the basis of race, to suppress or eliminate the rights recognised by the constitution, the creation or attempted creation of organisations aiming to weaken or diminish national sentiments, and the leadership or administration of such organisations aiming to weaken or diminish national sentiments, and the leadership or administration of such organisation are criminal offences punishable by from eight to fifteen year incarceration’.

141-5: Membership of such organisation is punishable by from five to twelve year incarceration.’

141-6: These terms of imprisonment will be increased by one third if the above-mentioned crimes are committed within government offices, town halls, schools or establishments for higher education, trade union or other labour organisations, buildings belonging to organisations whose capital is owned or partly owned by the state, and similarly if they are committed by employees and officials of such bodies.

141-8: ‘For the purposes of this legislation, an organisation shall consist of any gathering of two or more persons to pursue a common goal’.

Article 142-3: ‘Any person who, on the basis of races, attempts to suppress or eliminate the rights recognised by the Constitution, or attempts to weaken or diminish national sentiments will be liable to a term of imprisonment of form five to ten years.’

142-4: ‘Anyone found guilty of praising the above-mentioned actions will be liable to term of imprisonment of from two to five year incarceration’.

142-5: ‘These terms of imprisonment will be increased by one third if the above-mentioned crimes are committed in the circumstances laid down in article 141-6.’

142-6: ‘If any of the above-mentioned criminal offences is committed by way of publication, the sentences will be increased by one half.’; reproduced in Chaliand, ‘Kurdish Tragedy’, *op. cit.*, pp. 31-32.

²³⁹ Muller & Linzey, ‘the Internally Displaced Kurds of Turkey, *op. cit.*, pp. 22-23.

²⁴⁰ Kemal Kirisci & Gareth Winrow, ‘the Kurdish Question and Turkey, *op. cit.*, p. 99, quoted in Allain, ‘International Law in the Middle East’, *op. cit.*, p. 24; for the text of the Law of Resettlement (Law 2510) see Kendal, ‘Kurdistan in Turkey’, *op. cit.*, p. 57.

constitute no more than 5 per cent of the population, thus extinguishing Kurdish identity.’²⁴¹ Such draconian measures resulted in a series of rebellions in Turkey that this study will deal with below.

2.3.3 The major Kurdish revolts in Turkey

As noticed above, the Kurds had rendered great services to the Ottoman Empire for which they had shed their blood for its defence especially in the course of the World War I and its aftermath.²⁴² In other words, what bound the Turks and Kurds at this stage was the preservation of the concept of Caliphate in what remained of the Ottoman Empire. As the Kemalist secular notion of a Turkish nation emerged the resultant by-product was the abolition of the Caliphate on 3 March 1924, a decree banned all Kurdish Schools, associations, publications, and religious fraternities.²⁴³ Hence, this action not only weakened the old Ottoman concept of a Muslim *Umma* (community) and severed the bond between the Kemalism and the Kurds irreparably.²⁴⁴ It should not be forgotten that as the Ottoman Empire laid prostrate Ataturk had appealed to the Kurdish population to preserve the concept of Caliphate in the context of a Muslim Empire. He said in September 1919, ‘as long as there are fine people with honour and respect, Turks and Kurds will continue to live together as brothers around the institution of Caliphate, and an unshakeable iron tower will be raised against internal and external enemies.’²⁴⁵

From 1925 to 1939, as a reaction to the Kemalist ultra nationalist policy the Kurdish population of modern Turkey experienced some of the most brutal and bloodiest armed conflicts between the Turkish army and the Kurdish armed groups. The tension that existed between the Kurds and the newly established nationalistic government led to a period of marked instability.²⁴⁶ Disenchanted and angry, Kurdish leaders embarked upon a revolt for independence.

²⁴¹ McDowall, ‘a Modern History of the Kurds’, *op. cit.*, p. 207.

²⁴² Safrastian, ‘Kurds and Kurdistan’, *op. cit.*, p. 81.

²⁴³ Kendal, ‘Kurdistan in Turkey’, *op. cit.*, p. 51.

²⁴⁴ Chaliand, ‘the Kurdish Tragedy’, *op. cit.*, p. 29.

²⁴⁵ British Foreign Office, 371/7858, Rawlinson, Memorandum on the position of Angora Government, 4 March 1922, cited in McDowall, ‘a Modern History of the Kurds’, *op. cit.*, p. 187.

²⁴⁶ Chaliand, ‘the Kurdish Tragedy’, *op. cit.*, p. 36.

2.3.3.1 Sheikh Said revolt, 1925

The first major challenge to the Kemalist authoritarian regime was the revolt of Sheikh Said of Piran in February 1925 with a Kurdish force numbering an estimated fifteen thousand men. Under his leadership a staff of veteran Kurdish officers, munitions depots were established and a general revolt of the Kurds was set for 21 March 1925, with the aim of driving the Turks out of the Kurdish territory.²⁴⁷ A proclamation publicized by the Kurds on 14 February 1925, declared Darhîni as provincial capital of Kurdistan,²⁴⁸ and Sheikh Said became “the supreme commander of the Kurdish combatants”.²⁴⁹ According to Chaliand ‘the strategy adopted was of a direct attack on the principal towns and the aim was to install, without delay, an embryonic administration, a *de facto* state in order to gain international recognition.’²⁵⁰ However, the impending revolt was sabotaged due to a successful espionage by the Turks.²⁵¹ Hence, rather than attacking on 21 March 1925, the revolt broke out on 7 March prematurely fourteen days earlier than intended with only two hundred strong men as opposed to a larger force. This was mainly due to the fact the Kurdish forces had no means of communications (telegraph or wireless stations) to coordinate their operation.

Sheikh Said, a devout Muslim, was the son of a hereditary chief of the Naqshbandi dervishes and his revolt was inspired very much by the activities of a Kurdish nationalist movement namely *Ciwata Azadi Kurd* (Kurdish Freedom Society), which later changed its title to *Ciwata Kweseriya Kurd* (Kurdish Independent Society), or *Azadi* meaning freedom or independence.²⁵² Although this organisation was founded in secret in Anatolia between 1921 and 1924, the Turkish authorities were aware of and concerned about the existence of this organisation.²⁵³ In order to neutralize the influence of this organisation the Turkish authorities routinely dismissed and severely punished Kurdish officers suspected of having sympathy with or being a member of the abovementioned organisation.²⁵⁴ It is worth noting that this organization had played a crucial role in planning a Kurdish officers’ revolt at the *Beyt Sebah* garrison in September 1924, which subsequently had been unsuccessful because the leaders

²⁴⁷ Safrastian, ‘the Kurds and Kurdistan’, *op. cit.*, p. 82.

²⁴⁸ N. Dersimî, ‘Kurdistan Tarihinde Dersim’ (Dersim in the History of Kurdistan), Aleppo, 1952, p. 176.

²⁴⁹ Kendal, ‘Kurdistan in Turkey’, *op. cit.*, p. 52

²⁵⁰ Chaliand, ‘the Kurdish Tragedy’, *op. cit.*, p. 37.

²⁵¹ Wadie Jwaideh, ‘Kurdish National Movement’, *op. cit.*, p. 205.

²⁵² Olson opines that the role of Azadi was threefold: ‘to deliver the Kurds from Turkish oppression; to give Kurds freedom and opportunity to develop their country; and to obtain British assistance, realising Kurdistan could not stand alone’, Olson, ‘the Emergence of Kurdish Nationalism’, *op. cit.*, p.41/51.

²⁵³ Martin van Bruinessen, ‘Agha, Sheikh and State’, *op. cit.*, pp.373 & 446-7.

²⁵⁴ Entessar, Kurdish Ethnonationalism, *op. cit.*, p. 83

of *Azadi* were unable to synchronize the Kurdish officers' rebellion with the anticipated uprisings of tribal leaders.²⁵⁵

It has been noticed that it would be wrong to construe Sheikh Said's revolt as a purely religious uprising against modernization and secularization. He was a staunch Kurdish nationalist and harboured an ambition of creating an independent Kurdish state who was 'simultaneously an ardent nationalist and a committed believer ... for the average Kurd who participated in the rebellion, the religious and nationalist motivations were doubtless mixed'.²⁵⁶ This is true in light of the fact that 'most Kurds did not consider religious identification and Kurdish nationalism as antagonistic concepts, nor did they view them as being mutually exclusive.'²⁵⁷

From 7 March 1925, the Kurdish forces had captured a vast area of the country, occupying a third of Kurdistan in Turkey, and were besieging Diyarbakir. Other Kurdish units were liberating the region north of Lake Van as well as advancing towards the Ararat area and Bitlis.²⁵⁸ These actions prompted Turkey to decree a partial mobilisation and sent the bulk of its armed forces of 80,000 men into the warring region.²⁵⁹

Although he was supported by some important tribal leaders the biggest weakness of Sheikh Said's revolt was the fact that his support was mainly drawn from the Zaza tribesmen and crucially lacked support from urban populace. McDowall notes that 'it demonstrated yet again the difficulty of uniting the different geographical, linguistic, socio-economic and religious elements among the Kurds.'²⁶⁰ Major Kurdish cities such as Diyarbakir did not join the revolt due to excessive looting and pillage of Sheikh Said's forces.²⁶¹

In spite of its short duration, Sheikh Said's revolt marked a watershed in the Turkish-Kurdish relations as a result of which the Turkish government adopted draconian measures against any manifestations of Kurdish culture and nationalism in the aftermath of this revolt.²⁶² One of the main consequences of such harsh measures against the Kurds in eastern Turkey was that many of them in the Mosul *vilayet*, (claimed both by Turkey and the British Mandate of Iraq) opted to express a definitive desire to become part of Iraq.²⁶³

²⁵⁵ Entessar, *ibid*, p. 83.

²⁵⁶ Olson, 'the Emergence of Kurdish Nationalism', *op. cit.*, p. 154.

²⁵⁷ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 84.

²⁵⁸ Kendal, 'Kurdistan in Turkey', *op. cit.*, p. 52

²⁵⁹ Kendal, *Ibid*.

²⁶⁰ McDowall, 'Modern History of the Kurds', *op. cit.*, p. 197.

²⁶¹ H. Arfa, 'the Kurds', *op. cit.*, p. 36-37; Olson, 'the Emergence of Kurdish Nationalism', *op. cit.*, p. 155.

²⁶² Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 84.

²⁶³ See generally, Quincy Wright, Quincy Wright, 'The Mosul Dispute', *op. cit.*

The intensity of Sheikh Said's revolt was such that the Turks had to mobilize three army corps against the Kurds. Many defeats were inflicted upon the Turkish forces resulting in the capture of the cities of Urfa, Severak and Diyarbakir, the capital of Kurdistan, occupying the southern section of that city.²⁶⁴ Faced with certain defeat, Turkey's 'considerations of strategy and logistics pointed to the necessity of finding an access to rebel territory, protected as it was by impassable mountain barriers.'²⁶⁵ It managed to persuade France to allow its troops the use of the Syrian railways to transport its fresh corps and supplies in order to open a new front against the Kurdish fighters.²⁶⁶ Permission was granted in accordance with Article 10 of the Franco-Turkish agreement of 20 October, 1921.²⁶⁷ As a result, by 1926, the Kurdish forces had no alternative but to abandon their positions and retire to the strategic new positions north of Tigris and as far north as Mount Ararat, which form an impregnable natural fortress. In the aftermath of the revolt, special Court-Martials known as Tribunals of Independence were set up.²⁶⁸ The most notable was the one that summarily tried and condemned Sheikh Said along with 52 of his partisans to death. They were executed in Diyarbakir on 25 September 1925.²⁶⁹ It has been recorded that after the revolt was over, the Turkish government through the military authorities and the "Independence Tribunals" dealt very severely with the Kurds, executing many of the leaders of the revolt and a large number of the Kurds. More than 20,000 in all were deported from south east and forcibly settled in the west of the country.²⁷⁰

2.3.3.2 Ararat revolt, 1927-1930

The second noteworthy Kurdish revolt in the aftermath of the creation of the Turkish republic was instigated by Ihsan Nuri Pasha, a former commander of the Ottoman army. In the aftermath of the Sheikh Said revolt 'the Turkish government was beginning to think that the only way to bring Kurdistan to heel was to denude it of population. During the winters of 1925 to 1928, almost a million people were deported. Tens of thousands died on the way due to lack of food and supplies and because of the huge distances they were forced to cross in

²⁶⁴ Safrastian, 'Kurds and Kurdistan', *op. cit.*, p. 83.

²⁶⁵ Wadie Jwaideh, 'Kurdish Nationalist Movement', *op. cit.*, p. 205.

²⁶⁶ Safrastian, 'Kurds and Kurdistan', *op. cit.*, p. 83.

²⁶⁷ This agreement is also known as the Franklin-Bouillon Agreement of 1921. Kurdish and prokurdish sources have emphasised the decisive advantage gained by the Turks to through the use of the Syrian section of the Baghdad railway. See, for example S. Bedir-Khan, p. 48; Safrastian, p. 83.

²⁶⁸ Wadie Jwaideh, 'Kurdish National Movement', *op. cit.*, p. 206.

²⁶⁹ Chaliand, 'the Kurdish Tragedy', *op. cit.*, p. 37.

²⁷⁰ E-Z Zurcher, 'Turkey: a Modern History', I.B. Tauris, 3rd ed., P. 172.

the middle of the harsh Anatolian winter'.²⁷¹ This revolt took place shortly after Sheikh Said's ended. By 1920, General Ihsan Nuri Pasha, the commander of the Kurdish force, was already in control of the area between Mount Ararat and the north of Van and Bitlis. Faced with this problem the Turkish government was slow to mobilise its troops possibly because of political and social problems that were troubling Turkey at the time.²⁷² By 1928, a miniature Kurdish state had been created at *Agri Dagh*, a small army of several thousand well equipped and well trained Kurdish fighters had been gathered, arsenals and supply depots set up, and the Kurdish flag hoisted.²⁷³ The fighting in this revolt was particularly fierce around Mount Ararat in the northern region of Turkish Kurdistan. This revolt was also of a particular significance since for the first time it was supported by a secular Kurdish organisation called the *Khoyboun* (independence), formed by a group of exiled Kurdish intellectuals based in Syria and Lebanon with the ultimate ambition of creating a united front in supporting Ihsan Nuri's revolt.²⁷⁴ In October, 1927, Kurdish leaders of diverse political affiliations met outside Kurdistan to form a national pact, as well as to take necessary steps to realise their national aspirations. *Khoyboun* organisation was unanimously created as the supreme national organ, or Kurdish government, and invested that government with full and exclusive national and international powers.²⁷⁵ This revolt also marked the involvement of a regional sovereign state in which the Kurdish forces secured the tacit support of Reza Shah of Iran who was using the Kurds as a bargaining chip to force Turkey to settle some of its territorial disputes with Iran.²⁷⁶ Unquestionably, this was not to be the last occasion that the Kurds were used to settle old scores between regional powers. This gave the Kurdish forces the right of passage through the Iranian territory to receive supplies and equipment from sources in Iranian Kurdistan and Azerbaijan.²⁷⁷ By 1929, Ihsan Nuri's movement was in control of a large territory spreading through Bitlis, Van, Ararat and Botan. Unable to keep Kurdish revolt from spreading to other areas of Kurdistan, faced with the resistance of the Kurdish troops, with hundreds of Turkish prisoners taken and planes shot down, it compelled the Turkish

²⁷¹ Kendal, 'Kurdistan in Turkey', *op. cit.*, p. 54.

²⁷² Chaliand, 'The Kurdish Tragedy', *op. cit.*, p. 38.

²⁷³ Wadie Jwaideh, 'Kurdish National Movement', *op. cit.*, fn. 50, p. 211.

²⁷⁴ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 85.

²⁷⁵ According to Prince Sureya Badr-khan: "The *Khoyboun*, thereupon proclaimed the independence of Kurdistan on 28 October 1927, as laid down in the Treaty of Serves, designated Kurd Ava, at *Egri Dagh* (Ararat) as the provincial capital of Kurdistan and by resolution, expressed the friendly sentiments of the Kurdish people for Persia, Armenia, Iraq and Syria, and the determination to wage relentless war against the Turks, until they had left for good, the Kurdish soil now under the Greek. The war between Turks and Kurds is going on-and will go on-until the objective of the Kurd has been attained".

²⁷⁶ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 83.

²⁷⁷ Kinnane, 'the Kurds and Kurdistan', *op. cit.*, pp. 30-31; Arfa, 'the Kurds', *op. cit.*, p. 40.

government to lodge numerous protests with Reza Shah's government, demanding that Iran prevent the Kurds from using its territory as a military launching base against Turkish forces.²⁷⁸ By early 1932, both Iran and Turkey were eager to settle their territorial disputes and establish cordial relations. On 23 January the two countries signed an agreement whereby Turkey was given an area around Mount Ararat and Iran gained territorial concessions around Van to the west of Uromiyah.²⁷⁹

However, the Turkish-Iranian rapprochement had taken place two years before the signing of the 1932 agreement in which the Turkish government finally managed to convince Reza Shah to cut off supply of arms and equipment to Ihsan Nuri's forces as well as allowing Turkish forces to enter Iranian territory in pursuit of the Kurdish fighters. In spite of its earlier success, Ihsan Nuri's revolt succumbed to the inevitable defeat faced with much superior Turkish army and the fact that it was no longer supported logistically by Iran. Defeated Ihsan Nuri and some of his closest allies escaped to Iran but many other members of his inner circle were executed publicly or severely punished by the Turkish army.²⁸⁰ In the aftermath of the defeat of Ihsan Nuri's revolt what followed was one of the harshest treatment of the Kurds meted out by the Turkish army which included the mass deportation of Kurdish villages, the exiling of Sheiks and Aghas as well as forced recruitment of young Kurds into the Turkish army to name a few.²⁸¹ The Turkish government also condoned acts of vigilantism against the Kurds during this period of repression, and in some cases legally sanctioned such behaviour. An example of this is best illustrated in Law No. 1,850, which reads:

Murders and other actions committed individually or collectively, from the 20th of June 1930 to 10th of December 1930, by the representatives of the state or the province, by the military or civil authorities, by the local authorities, by guards or militiamen, or by any civilian having helped the above or acted on their behalf, during the pursuit and extermination of the revolts which broke out in Ercis, Zilan, Agridag (Ararat), and the surrounding areas, including Pulumur in Erzincan province and the area of the First Inspectorate, will not be considered as crimes.²⁸²

According to Chaliand the repression came down on all the Kurdish regions, not just those involved in the revolt which included mass deportation and dispersion of the Kurds. The law

²⁷⁸ Chaliand, 'The Kurdish Tragedy', *op. cit.*, p. 38.

²⁷⁹ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 85.

²⁸⁰ For example, the Turkish army reportedly arrested some one hundred Kurdish intellectuals in Van, sewed them into sacks, and through them to Lake Van to die an agonising death; Kendal, 'Kurdistan in Turkey', *op. cit.*, p. 65.

²⁸¹ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 85.

²⁸² Quoted in *ibid.*

of 5 May 1932 instituted four separated categories of inhabited zones three of which were in Kurdistan.²⁸³ For example, in February 1932, a large number of Kurdish people were deported to Anatolia, and this policy continued until 1935.²⁸⁴

2.3.3.3 The Dersim revolt of 1937

The third major revolt happened in the mountainous region of Dersim highlands in January 1937. The Dersim revolt was one of the bloodiest that took place after the creation of the modern Turkish republic. Some scholars have even questioned whether in the course of quelling the Kurdish forces Turkish army committed genocide.²⁸⁵ According to Kendal 'the carefully prepared attack on this last pocket of Kurdish resistance was an integral part of the Ankara government's policy of piecemeal pacification of Kurds'.²⁸⁶ The inhabitants of this secluded and inaccessible territory, who spoke the Zaza dialect and were followers of extreme Shi'a Islam had always retained their autonomy and were notoriously defiant to the central rule even throughout the reign of the Ottomans.²⁸⁷ An indication of their rebelliousness was the fact that its inhabitants had not joined the *Hamidiye* regiment and had refused to participate in the Russo-Turkish wars, of the First World War, or the Turkish war of independence as well as had not taken part in any of the previous Kurdish revolts.²⁸⁸ Because of the difference in their religious affiliation they were indifferent to the abolition of the caliphate and were certainly not in sympathy with the religious doctrine of Sunni Kurdish Sheikhs.²⁸⁹ However, the intrusion of Turkish secular laws and arms shattered the linguistic, religious and geographic isolation that had hitherto checked the spread of Kurdish nationalism among the Dersim Kurds.²⁹⁰

Dersim was situated in a terrain surrounded almost on all sides by the high snow-capped peaks of the *Merjan Dag* (about 3,500 meters), *Mntsur Dag* and others. Dersim was an oasis of green fields, shady valleys, ancient forests and flourishing orchards. It has been

²⁸³ Wadie Jwaideh, 'Kurdish National Movement', *op. cit.*, p. 214.

²⁸⁴ Chaliand, 'The Kurdish Tragedy', *op. cit.*, p. 39.

²⁸⁵ M. Van-Bruinessen, 'Genocide in Kurdistan? The Suppression of the Dersim Rebellion in Turkey (1937-38) and the Chemical War against the Iraqi Kurds (1988)', in G.J. Andreopoulos (ed.), *Conceptual and Historical Dimensions of Genocide*, Pennsylvania U.P., 1994, pp. 141-70.

²⁸⁶ Kendal, 'Kurdistan in Turkey', *op. cit.*, p. 58.

²⁸⁷ Jwaideh, 'Kurdish National Movement', *op. cit.*, p. 215; McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 207.

²⁸⁸ Safrastian, 'Kurds and Kurdistan', *op. cit.*, p. 86.

²⁸⁹ Jwaideh, 'Kurdish National Movement', *op. cit.*, p. 215

²⁹⁰ W.G. Elphinston, 'Kurds and the Kurdish Question' *Journal of the Royal Central Asian Society* 35, Part 1 (Jan. 1948), pp. 38-51, p. 44.

noticed that until 1908 the place was hardly known to the Turks, its population led an isolated life of agriculture, cattle-farming and vine-growing.²⁹¹ It is worth noting that during 1930s, the Kemalist policy towards Dersim had been remarkably vague.²⁹² The main cause of Dersim revolt has been attributed to the promulgation by the Turkish government of a law designed to enforce assimilation, which particularly incensed the Kurdish population of Dersim.²⁹³ Furthermore, according to the 1932 law on accommodation, Dersim had been designated to the fourth category which was to be totally evacuated from its Kurdish population.²⁹⁴ In 1936, the Turkish government attempted to transfer the population from this region but in spite of involvement of 60,000 Turkish troops and because of inaccessibility of the terrain the Kurds managed to resist such move. Elphinston notes:

It would appear that the Turkish government policy had, in the first place, antagonised the Kurdish patriarchal feudal leader; in the second place, it had led to the opposition of the religious leaders, and finally, the Kurdish people themselves had been aroused by the fear that they might lose their separate racial identity.²⁹⁵

In step with other Kurdish revolts of this period, this uprising was led by a religious chieftain, eighty-two-year-old Sayyid Riza of Dersim. He led the revolt for two years resulting in heavy losses of life and material for both the government forces and the Kurds.²⁹⁶ Due to the isolation of the region and censorship imposed upon military communiqués, little is known about the military operations and loss of life on both sides. However, on the basis of the information available the suppression of Dersim revolt involved a considerable military operation as well as a high intensity armed conflict between the warring parties.²⁹⁷ For the first time the Kurdish forces resorted to guerrilla warfare, which the conventional Turkish army found difficult to deal with. This conflict was unlike anything fought on Kurdish territory, in which there was no front, no battles between large military units.²⁹⁸ This heralded a new tactic used by Kurdish fighters against a sovereign state. By the end of summer of 1937, in spite of massive use of poison gas, heavy artillery and the use of air bombardment,

²⁹¹ Safrastian, 'Kurds and Kurdistan', *op. cit.*, p. 86.

²⁹² Chaliand, 'The Kurdish Tragedy', *op. cit.*, p. 39.

²⁹³ Jwaideh, 'Kurdish National Movement', *op. cit.*, p. 215.

²⁹⁴ Chaliand, 'The Kurdish Tragedy', *op. cit.*, p. 39.

²⁹⁵ Elphinston, 'Kurds and the Kurdish Question', *op. cit.*, p. 45.

²⁹⁶ Gunter, 'A to Z of the Kurds', *op. cit.*, p. 82.

²⁹⁷ This force was estimated at the time at twenty-five thousand men. *Le Temps*, Aug. 18, 1937. Cf. Irmine Romanette, *Le Kurdistan et La question Kurde* (Paris: Librairie Marceau, 1935), 18; cited in Jwaideh, 'Kurdish National Movement', *op. cit.*, p. 361, fn. 72.

²⁹⁸ Kendal, 'Kurdistan in Turkey', *op. cit.*, p. 58.

the Turkish army could not overcome resistance of the Kurds in Dersim.²⁹⁹ This prompted the Turkish army to concentrate three army divisions and most of its air force in the Dersim region. It took until October 1938 to finally break down the resistance of Dersin population. Due to running out of food and ammunition they decided to lay down their arms.³⁰⁰ The leaders of the revolt, including Sayyid Riza and their families surrendered to the Turkish army. The leaders were summarily tried and executed.³⁰¹ As a retaliatory measure the Kurdish government embarked upon a massive deportation of Kurdish population of Dersim region.³⁰² It has been alleged by Kurdish sources that the Turks resorted to the most inhuman methods to punish the rebels both in the course of and after the revolt.³⁰³ As noted above, there are no official casualty figures available to ascertain the number that were killed during the revolt and deported in its aftermath.³⁰⁴ Nevertheless, one source estimates the number of casualties at forty thousand and another puts the number of Kurdish families deported at three thousand.³⁰⁵ Some observers are of the opinion that the violence of the repression smashed the Kurdish resistant movement which was not to be rebuilt until the 1950s.³⁰⁶ Kendal says:

The whole affair reflected so badly on the “progressive Ankara regime” that “the entire area beyond the Euphrates” was declared out of bounds to foreigners until 1965 and was kept under permanent stage of siege till 1950. The use of Kurdish language was band. The very words “Kurds” and “Kurdistan” were crossed out of the dictionaries and history books. The Kurds were never ever referred to except “mountain Turks.”³⁰⁷

2.4 The Kurds in Iraq: 1923-1945

2.4.1 Iraq: a British creation

Although Mesopotamia is recognised as the cradle of civilization and the city of Baghdad has a long history of contributing to the Islamic culture, the Country of Iraq is a twentieth century creation.³⁰⁸ In fact, it has been described as a British creation.³⁰⁹ Before World War I ended,

²⁹⁹ M. Van Bruinessen, ‘Genocide in Kurdistan’, *op. cit.*, p. 147.

³⁰⁰ Jwaideh, ‘Kurdish National Movement’, *op. cit.*, p. 216.

³⁰¹ McDowall, ‘a Modern History of the Kurds’, *op. cit.*, p. 208.

³⁰² Jwaideh, ‘Kurdish National Movement’, *op. cit.*, p. 216.

³⁰³ Dersimi, ‘Dersim in the History of Kurdistan’, *op. cit.*, pp. 190-203.

³⁰⁴ Jwaideh, ‘Kurdish National Movement’, *op. cit.*, p. 216.

³⁰⁵ M. Van Bruinessen, ‘Genocide in Kurdistan’, *op. cit.*, p. 154.

³⁰⁶ Chaliand, ‘The Kurdish Tragedy’, *op. cit.*, p. 39.

³⁰⁷ Kendal, ‘Kurdistan in Turkey’, *op. cit.*, p. 58.

³⁰⁸ Entessar, ‘Kurdish Ethnonationalism’, *op. cit.*, p. 49.

Britain decided to create the state of Iraq, initially by adjoining the two Ottoman Provinces of Basra and Baghdad, making them come under the jurisdiction of the British mandatory power under the provisions of the secret Sykes-Picot Agreement.³¹⁰ On 1 May 1920, the League of Nations gave Britain mandatory power over Iraq.³¹¹ With the discovery of oil in the *Vilayet* (province) of Mosul, Britain changed plans and decided to include Mosul (populated mainly by Kurds) as part of the new country of Iraq.³¹² Vanly notes that:

... the British imperialists who were in control had already decided that, in order to appropriate the oil fields in Southern Kurdistan, they were going to ride roughshod over the people's aspirations. They were quite determined to set up a client state which bring together the three ancient *vilayets* of Basra, Baghdad and Mosul.³¹³

So in 1918, Britain occupied Mosul still under the Ottoman jurisdiction in violation of the armistice of Mudros between the Allied Powers and the Sultan's Turkey signed on 30 October 1918.³¹⁴ In November, 1918, Britain forced Turkish General Ali Ihsan Pasha to sign a capitulating agreement followed by the complete withdrawal of the Ottoman forces from the province of Mosul.³¹⁵ In fact, this was a partial occupation of the Mosul province by the British forces since the city of Sulaymaniya was under the occupation of one of the well-respected Kurdish nationalist leaders, Sheikh Mahmud Barzinji who raised forces over an area extending to Kurdistan in Iran.³¹⁶ As will be seen below Sheikh Mahmud staged two rebellions against the British forces as a manifestation of the Kurd's refusal to be ruled by Arabs in Iraq.³¹⁷ What Sir Arnold Wilson, the main British political officer in Bagdad, says is indicative:

The Kurds wish neither to continue under the Turkish government nor to be placed under the control of the Iraqi government', he confirms that 'in Southern Kurdistan, four out of five peoples supported Sheikh Mahmud's plan to set up an independent

³⁰⁹ Chaliand, 'Kurdish Tragedy', *op. cit.*, p. 51.

³¹⁰ Lokman I. Meho & K.L. Maglaughlin (ed.), 'Kurdish Culture & Society: An Annotated Bibliography', Greenwood Press, 2001, p. 18.

³¹¹ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 51.

³¹² Gareth Stansfield, 'the Kurdish Question in Iraq: 1914-1947', Middle East-On-Line, Series 2, Introductory Essays, the National Archives, UK, 2007, p. 2; for more information on Mosul question, see Charles Tripp, 'A history of Iraq, Cambridge U.P., 2000, pp.58-60.

³¹³ Vanly, 'Kurdistan in Iraq', *op. cit.*, p. 145.

³¹⁴ P. Sluglett, 'Britain in Iraq: Contriving King & Country, 1914-1932', Ithaca Press, 1976, p. 14.

³¹⁵ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 50.

³¹⁶ Ismet Sheriff Vanly, 'Kurdistan in Iraq', in G. Chaliand (ed.), 'People without a Country: the Kurds and Kurdistan', *op. cit.*, p. 145.

³¹⁷ Chaliand, 'Kurdish Tragedy', *op. cit.*, p. 51.

Kurdistan ... the idea of Kurdistan for the Kurds was already popular ... nearly all the Kurds were anxious to break their ties with Turkey.³¹⁸

The British occupation of Mosul also resulted in many skirmishes among the powers involved, but the British who were to administer the new Iraq, prevailed and in 1925 Mosul was attached to Iraq.³¹⁹

2.4.2 The false promise of self-rule

While the Kurds of Iran and Turkey were affected dramatically by the Westernized policies of those states, this was not the case for Iraq's Kurds.³²⁰ In the case of Iraq rather than assimilating the Kurdish population in order to amalgamate the province of Mosul, the British policy favoured appointment of local Kurdish leaders to administer under the direction of their British advisors. Let us not forget that the Treaty of *Sèvres* had provided the possibility of a sovereign Kurdistan including the province of Mosul, under the proviso that the majority of its inhabitants voted for independence.³²¹ Eventually, at the Cairo Conference of 1921, the idea of allowing the emergence of a separate southern Kurdistan function as a 'buffer zone' in the north Mesopotamia was finally discarded in favour of retaining it as a part of Iraq.³²² By the time the state of Iraq was created Britain had long since betrayed its offer of self-determination to the Kurds.³²³ These broken promises and lost opportunities convinced many Kurds that they were 'expendable tools in the hands of great powers', a theme persisting throughout the twentieth century and beyond.³²⁴ Unfortunately, for the Kurds of Southern Kurdistan in the precarious period following the World War I, they were insufficiently united to press on for independence or other collective rights.³²⁵ McDowall says:

The Kurds were politically inept in their response to the post war situation. Poor communications, diffusion of society and the adversarial nature of inter-tribal relations made the presentation of a united political position virtually impossible. On the whole most Aghas and Sheikhs were happy to fall in with British plans, since, these included

³¹⁸ A. Wilson, 'Mesopotamia 1917-1920, (London 1931), p. 103, 127, 129, 134 & 137 cited in Ismet Sheriff Vanly, 'Kurdistan in Iraq', p. 145

³¹⁹ Mahir A. Aziz, 'The Kurds of Iraq: Ethnonationalism & National Identity in Iraqi Kurdistan', Tauris, 2011, p. 59.

³²⁰ Charountaki, 'The Kurds and US Foreign Policy', *op. cit.*, p. 47.

³²¹ As seen above according to Article 64 of the Treaty of Lausanne.

³²² McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 166; Aziz, 'the Kurds of Iraq', *op. cit.*, p. 61.

³²³ McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 151.

³²⁴ Ghareeb, 'the Kurdish Issue', in Iraq: Its History, People and Politics', *op. cit.*, p. 168.

³²⁵ Meiselas, 'Kurdistan: In the Shadow of History', *op. cit.*, p. 152.

administration through the traditional patronage system; but subordination to Arab rule stuck in their craw.³²⁶

Britain faced opposition from the Kurdish population of Mosul Province as well as Ataturk who was decidedly dissatisfied.³²⁷ Aziz opines that:

Between 1918 and 1929 the British policy towards the Kurds was to encourage Kurdish nationalism but not independence. From 1918 to 1923 British colonial officers had no clear policy or approach towards the Kurds or Mesopotamian region. Many observers felt that the British policy in Kurdistan was vague and amorphous. British Policy was not only fluid, but it also varied according to the perceptions and interests of decision makers.³²⁸

2.4.3 The establishment of monarchy: the nascent Arab state

Nevertheless, there is no doubt that there was a contradiction between London's stated policy and the one put into practice in the Middle East.³²⁹ On 23 August 1921, following a faked referendum organised by the British mostly shunned by the Kurdish population of the Province of Mosul, Britain installed Emir Faisal, on the throne as the King of new Hashemite monarchy in Iraq.³³⁰ Faisal was a prince who was not from Iraq. In order to forge a unitary system in Iraq, Britain sought to integrate the Kurds into the new state by allocating the Kurds some senior positions within the new Arab-led administration.³³¹ But as one commentator noted, the British authorities in Kurdistan 'supported Kurdish participation in high office while those in Baghdad took a dim view of the Kurds.'³³² Moreover, Britain's intention was to establish one or several semiautonomous Kurdish provinces under the jurisdiction of the nascent state of Iraq.³³³ In fact, the 1921 Iraqi Constitution declared that the state of Iraq was comprised of two ethnic groupings Arab and Kurds, and that Kurdish along Arabic was recognised as one of the official languages, Natali notes that because of 'seeking Iraq's admission to the League of Nations, the British tried to ensure minority groups' rights in the new state ... even 'welcomed outside intervention, inviting international

³²⁶ McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 151.

³²⁷ E. Ghareeb, 'The Kurdish Issue', in S.C. Inati (ed.) 'Iraq: Its History, People and Politics', Prometheus Books, 2003, p. 168.

³²⁸ Aziz, 'the Kurds of Iraq', *op. cit.*, p. 59.

³²⁹ Vanly, 'Kurdistan in Iraq', *op. cit.*, p. 146.

³³⁰ Vanly, *ibid.*

³³¹ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 51.

³³² D. Kinnane, 'The Kurds and Kurdistan', Oxford U.P., 1964.

³³³ Lokman & Maglaughlin, 'Kurdish Culture & Society', *op. cit.*, p. 18.

commission to Iraq that recognised the quasi-autonomy of the local groups.³³⁴ It is vital to note that: ‘by treating Mosul Province as a separate entity from Arab Iraq the British gave Kurdistan semi-legitimate political status from the outset of the nation-building project.’³³⁵ Therefore, Iraq was divided into two zones of al-Iraq and al-Arab (or the central and southern Arab zone which included Baghdad and Basra provinces, and the northern territory which included Mosul of al-Iraq al-Cadjmi (Irak-Perse)).³³⁶ Britain even attempted to institutionalise Kurdish identity in the newly formed state of Iraq by issuing an Anglo-Iraqi Joint Declaration on 24 December 1922, which solemnly recognised the right of Kurdish population to form an autonomous Kurdish government within the frontier of Iraq.³³⁷ In order to calm the restive Kurds, a joint Anglo-Iraqi state of intent was issued in London on 20 December 1922: ‘His Britannic Majesty’s Government and the Government of Iraq recognize the right of the Kurds living within the boundaries of Iraq to set up a Kurdish Government within those boundaries and hope that the different Kurdish elements will, as soon as possible arrive at an agreement as to the form which they wish that government should take and the boundaries within which they wish it to extend and will send responsible delegates to Baghdad to discuss their economic and political relations with his Britannic Majesty’s Government and the Government of Iraq.’³³⁸

But according to Vanly, the aforementioned Declaration provided, ‘little satisfaction to the province of Suleymanieh, which ... had no desire to come under the authority of the King of Iraq and sought to pursue the struggle for a free and united Kurdistan.’³³⁹ This dissatisfaction was partly the reason for a series of rebellions which also British forces were deployed against Kurdish armed groups. Moreover, rather than neutralising ethnic and religious differences in Iraq with a heterogeneous population of comprised Shi’a Arab (51 per cent), Sunni Arabs (20 per cent), Shi’a Kurds, Shia Persians, Jews, Turkomen, Christians (11 per cent), the British opted to elevate the minority Sunni Arab population to rule over the others. Indeed, for many decades to come this imbalance became a bone of contention in regards to the relationship between the Sunni Arab administration and the Kurdish and the Shi’a population of Iraq.³⁴⁰ Reeva Simon explains the ideology of the new Iraqi state:

³³⁴ Natali, ‘the Kurds and the State, *op. cit.*, p. 27

³³⁵ *Ibid.*

³³⁶ *Ibid.*, p. 28.

³³⁷ McDowall, ‘a Modern History of the Kurds, *op. cit.*, p. 168-9.

³³⁸ McDowall, ‘a Modern History of Kurdistan’, *op. cit.*, p. 169.

³³⁹ Vanly, ‘Kurdistan in Iraq’, *op. cit.*, p. 147.

³⁴⁰ Natali, ‘the Kurds and the State’, *op. cit.*, p. 28-9.

Iraq's "imagined community" was that of Arabs, rather than Iraqis of Mesopotamians, Arabs whose identity and history were fashioned by Arab nationalist ideologues. These new elites, or priesthood, teachers who taught from the text books commissioned by the Ministry of Education in Baghdad, attempted to amalgamate the Sunni minority elite with the ethnic and religious minorities and the Shi'a majority via the glue of Arab nationalism in order to forge a Pan-Arab identity for the Iraqis.³⁴¹

By 1925 the British affirmed that 'it formed no part of the policy of His Majesty's Government to encourage or accept any responsibility for the formation of any autonomous or Kurdish state.'³⁴² Furthermore, in 1926 when the Iraqi and British Governments were assured of the control of the Kurdish region they reneged on their promises made earlier to the Kurds in 1922:

... Both His Britannic Majesty's Government and the Government of Iraq are fully absolved from any obligation to allow the setting up of a Kurdish Government by a complete failure of the Kurdish elements even to attempt, at the time this proclamation was made, to arrive at any agreement among themselves or put forward any definite proposals ...³⁴³

The only assurance for the Kurdish population that remained was the stipulation made by the League of Nations whose Commission had advised that: 'the desire of the Kurds, the administrators, magistrates and teachers in their country be drawn from their own ranks, and adopt Kurdish as the official language in all their activities, will be taken into account.'³⁴⁴ As will be pointed out below, Kurdish revolts in Iraq followed the British announcement to end their mandate in 1930, as well as Iraq's accession to independence in 1932. Notwithstanding the fact that Britain reported to the League of Nations in 1928 that although Kurdish population in Iraq 'dream of an ultimate union of all the now scattered Kurdish tribes and peoples' they 'on the whole for the present are satisfied by the special administrative treatment and privileges which they enjoy.'³⁴⁵ But the period of lull was short lived and publication of the Anglo-Iraqi Treaty of 1930, which ended the British Mandate and established the independence of the state of Iraq in 1932 failed to live up to the Kurdish

³⁴¹ R.S. Simon, 'The Imposition of Nationalism on a Non-Nation State: the Case of Iraq during the Interwar Period, 1921-1941', J. Jankowski & I. Gershoni (ed), *Rethinking Arab Nationalism in the Middle east*, Columbia U.P., 1997, p. 88.

³⁴² Chaliand, 'Kurdish Tragedy', *op. cit.*, p. 73.

³⁴³ Cited in McDowall, 'A Modern History of the Kurds', *op. cit.*, p. 169.

³⁴⁴ Vanly, 'Kurdistan', *op. cit.*, p. 148.

³⁴⁵ See Great Britain Colonial Office, Report by His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland to the Council of the League of Nations on the Administration of Iraq for the Year 1928, p. 28.

safeguards the basis of the inclusion of the *Vilayet* of Mosul into the Mandate for Iraq. Consequently, there was dissatisfaction among the Kurdish population of Iraq which led to the second revolt by Sheikh Mahmud. Yet again with the aid of the British forces his revolt was defeated again in 1931, but this time the revolt did manage to put Kurdish issues on the international agenda.³⁴⁶ This left the new Iraqi government with no alternative but to pass a local language law in February 1932, which provided that Kurdish speakers rather than ethnic Kurds would fill administrative and teaching positions in the *Vilayet*.³⁴⁷ In this way:

The guarantees required by the league had been rid of their content: the nominal protection of cultural and language rights of the majority Kurdish population in the Vilayet vanished. For its part, the League of Nations did not stand in the way of Iraqi independence. The Council of the League accepting the Mandates Commission's view that it was unnecessary to require from an independent Iraq the guarantees it had sought from Great Britain as Mandatory, deeming the measure of the Local League Law adequate for the termination of the Mandate.³⁴⁸

Britain according to McDowall:

Thus found itself a compromised accomplice in Iraq's determination to integrate Kurdistan bereft of any special status. It was a shabby end to the high-flown promises with which British political officers had entered Kurdistan in 1918, and a betrayal of the assurances given by Arab Iraqi ministers during the formation of the Iraqi state.³⁴⁹

2.4.3.1 Kurdish revolts in Iraq

Although the repression of the Kurds in the newly created state of Iraq in the inter-war period was not as punitive as in Turkey, the amalgamation of the *vilayet* of Mosul into Iraq necessitated military subjugation of Kurdish nationalism.³⁵⁰ As stated above, Iraq was created after the collapse of the Ottoman Empire and its Kurdish population found themselves under the rule of King Feisal, an Arab, imposed by the British. Due to the vast reserves of oil and gas the British annexed southern Kurdistan which included *Vilayet* Mosul, with its Kurdish majority population, and set upon extending their sphere of interest among the Kurdish tribes based there. Although, this was only a partial occupation of southern Kurdistan since Kurdish

³⁴⁶ Allain, 'International Law in Middle East', *op. cit.*, p. 25.

³⁴⁷ M. Short & A. McDermott, 'the Kurds' (*London: Minority Rights Group*, Report No. 23, 1975), p. 9.

³⁴⁸ Allain, 'International Law in the Middle East', *op. cit.*, p. 26.

³⁴⁹ McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 177.

³⁵⁰ Allain, 'International Law in the Middle East', *op. cit.*, p. 25.

nationalist movement led by Sheikh Mahmud of the Barzinji tribe had Sulaymaniya region under its control. At first, the British seemed to have aimed merely at maintaining friendly relations with these tribes and used them as a buffer zone against the Turkish aggression toward the newly formed Iraqi state. Initially, British policy favoured the appointment of local tribal leaders to administer the territory, under the supervision of British advisors.³⁵¹ The aforementioned Sheikh Mahmud was one of the most prominent of such local tribal leaders and although not universally supported by all the tribes as their leader, he was accepted by the Kurdish notables in Sulaymaniya as their leader.³⁵² In the autumn of 1918, the Ottoman Commissioner and the Military base in Sulaymaniya surrendered to Sheikh Mahmud, hence officially ending Ottoman administration in that region.³⁵³ Consequently, Sheikh Mahmud was left in sole control of Sulaymaniya. On 1 December 1918, Arnold Wilson the acting civil administrator for Mesopotamia had endorsed Sheikh Mahmud as governor of Sulaymaniya, and assigned other Kurdish officials to administer various subdivisions under the guidance of British political officers.³⁵⁴ As governor of the autonomous Kurdish entity, Wilson had the authority to run local affairs and to appoint Kurdish officials in different areas under his control.³⁵⁵

2.4.3.2 Sheikh Mahmud's revolts

Once Faisal was in power he imposed his authority in the Kurdish region which until then had been under British control. However, the coming to power of the Kemalist regime in Turkey had reignited its desire to re-impose its control over *Vilayet Mosul* through instigating a campaign of unrest in June 1921. This resulted in uprising under the guidance of Turkish officers driving the British out of Sulaymaniya in September of that year. In order to counter the Turkish advances the British turned to Sheikh Mahmud, the only leader who had sufficient influence among the Kurdish tribes in order to prevent the recapture of the rest of southern Kurdistan by the Turks. Upon his return to Sulaymaniya in October 1922, Sheikh Mahmud proclaimed himself as the "king of Kurdistan" and set about forming an

³⁵¹ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 50.

³⁵² See the letter from Sheikh Mahmud to acting British Civil Commissioner Wilson signed by some forty chieftains cited in G. Bell, (Great Britain, Office of the Civil Commissioner, Iraq) Review of the Civil Administration of Mesopotamia, 1914-192. London: H.M. Stationary Office, 1920, p. 61.

³⁵³ Jwaideh, 'Kurdish National Movement', *op. cit.*, p. 163.

³⁵⁴ McDowall, 'Modern History of the Kurds', *op. cit.*, p. 156.

³⁵⁵ S. Eskander, 'Britain's Policy in Southern Kurdistan: the Formation and the Termination of the First Kurdish Government, 1918-1919', *British Journal of Middle Eastern Studies* (2000), 27(2), 139-163, p. 150.

administration in order to run the territory under the auspices of the British advisers. In reality, the British had used Sheikh Mahmud as a tool against the aggression of the Turks but eventually the cooperation between the British administrators and Sheikh Mahmud broke down. Two reasons have been cited for this break down of relations. First, Sheikh Mahmud wished to include Kirkuk to his administration against the wishes of the British, who wanted it administered from Baghdad. Secondly, Sheikh Mahmud decided, to play one power against another in order to strengthen his own position rather than taking on the Turks as the British had intended. Nevertheless, the biggest contributory factor to the breakdown of relations between the British and Sheikh Mahmud was the failure of the first Lausanne Treaty in February 1923, which resulted in the British change of policy towards Sheikh Mahmud and the self-proclaimed Kingdom of Kurdistan. Therefore, Britain withdrew all financial and logistical support for Sheikh Mahmud's administration and decided to impose direct rule on southern Kurdistan from Baghdad, which left the Sheikh and the nationalist circle around him with no option but to revolt against the British and to declare independence in May 1919.³⁵⁶ In preparation of the revolt he raised three hundred armed followers on the Iranian side of the border.³⁵⁷ The revolt started on 22 May 1919, with the arrest of all British military and political officials in Sulaymaniya and ejected the British garrison of levies.³⁵⁸ Sheikh Mahmud declared himself the ruler of all Kurdistan, seized the treasury, appointed his own administration officials and raised his own flag.³⁵⁹ The British decided to take countermeasures by sending a small expeditionary force from Kirkuk to Sulaymaniya to challenge Sheikh Mahmud, nonetheless the force proved inadequate and had to withdraw to Kirkuk.³⁶⁰ In the eyes of the Kurdish population this military success had an immediate and electrifying effect throughout southern Kurdistan tribes on both sides of the border (Iraq and Iran) they proclaimed themselves for Sheikh Mahmud.³⁶¹

The role of Britain's Royal Air Force (RAF) in 1921 in suppression of Sheikh Mahmud's revolt was critical. Lacking sufficient troops to quell the Kurdish uprising in Iraq, Britain used the Royal Air force (RAF) to bomb the Kurds, setting an enduring precedent for the region and the whole world.³⁶²

³⁵⁶ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 50.

³⁵⁷ McDowall, 'Modern History of the Kurds', *op. cit.*, p. 157.

³⁵⁸ Eskander, 'Britain's Policy in Southern Kurdistan', *op. cit.*, p. 152.

³⁵⁹ Wadie Jwaideh, 'Kurdish National Movement', *op. cit.*, p. 180.

³⁶⁰ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 50.

³⁶¹ McDowall, 'Modern History of the Kurds', *op. cit.*, p. 157.

³⁶² For more on the RAF bombings and the British policy in the region, see Vanly, 'Kurdistan, the Kurds and the Kurdish National Question', *op. cit.*, D. Romano, 'the Kurdish Nationalist Movement', Cambridge U.P., 2006, pp. 183-4.

2.4.3.3 The emergence of Mullah Mustafa Barzani

With the subjugation of Sheikh Mahmud's nationalist enterprise at the hands of the British a family would emerge whose name would become synonymous with Kurdish nationalism and its aspiration for self-determination.³⁶³ The Barzani family has played a pivotal role in the Kurdish nationalist movement since 1930s.³⁶⁴ The history of their mutiny against central rule goes back to 1907 when Sheikh Abdel Salam Barzani revolted against the Ottoman rule for the rights of the Kurds to be respected, which led to his arrest and execution. His brother Sheikh Ahmed Barzani became the next torchbearer for Kurdish autonomy by challenging the authority of the British Mandate holder of Mesopotamia which brought about a revolt between 1931 until 1934. The revolt started when Sheikh Ahmed Barzani, a determined and skilful leader in mountain warfare, send several hundred armed men across the border to support the Kurdish revolt of Mount Ararat to no avail.³⁶⁵ According to Entessar:

He was never able to acquire the needed assistance of other Kurdish tribes in confronting Iraqi and British troops. Another and perhaps more serious cause of the failure of Sheikh Ahmed's revolt was his opposition to the spring 1932 British plan to settle the Assyrian Christians who had left or been expelled from Turkey on or near Barzani tribal lands.³⁶⁶

The revolt was finally put down by a combined operation of the Iraqi land forces aided by the Royal Air Force bombardment which destroyed many villages under Barzani's control.³⁶⁷ Nonetheless, a group of his supporters continued armed struggle which was to keep the entire region in a state of insecurity until 1934.³⁶⁸ In 1932, Sheikh Ahmed Barzani's men inflicted heavy losses on Iraqi forces before surrendering to Turkish troops in June of that year. Sheikh Ahmed, his younger brother Mullah Mustafa and their followers were eventually exiled to Sulaymaniya and whereas,

... Sheikh Ahmed Barzani's star began to fade, his brother Mullah Mustafa, would rise for another twenty years. Mullah Mustafa Barzani would head a revolt that appear to have more to do with personal animosity toward the Iraqi leadership, and was actually related to the 1943 Kurdish famine, then to a nationalist rebellion. When his forces clashed with police in Barzan in 1943, he became the focal point of the Kurdish

³⁶³ Allain, 'International Law in the Middle East', *op. cit.*, p. 26.

³⁶⁴ Chaliand, 'the Kurdish Tragedy', *op. cit.*, p. 54.

³⁶⁵ Edmonds, 'Kurdish Nationalism', *op. cit.*, p. 95.

³⁶⁶ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 54.

³⁶⁷ Wadie Jwaideh, 'Kurdish National Movement', *op. cit.*, p. 227-228.

³⁶⁸ Chaliand, 'The Kurdish Tragedy', *op. cit.*, p. 54.

discontent with the Baghdad government. The Iraqi military again took heavy casualties in attempting to suppress a Barzani, and again, this time Mullah Mustafa Barzani would flee over a border to safety.³⁶⁹

With the hope of setting up their own independent state dashed, the Kurds continued to embark on minor revolts which were aimed at the Iraqi government. However, their nationalistic aspirations were to be realized albeit for a short period across the border in Iran.³⁷⁰ Indeed, Mullah Mustafa Barzani would make his name a household one as the military commander in the nascent Kurdish Mahabad Republic in Iran.³⁷¹

2.5 The Kurds in Iran

2.5.1 The end of the Qajar Dynasty

In step with other Kurdish nationalist movements, the modern Kurdish movement for autonomy in Iran is a new historical phenomenon which started emerging in the late nineteenth century.³⁷² So far this study has concentrated only on Kurdish regions which were the spoils of World War I,³⁷³ yet the Greater Kurdistan also includes the Province of *Kordestan* in Iran.³⁷⁴ Kurdistan in Iran has always been a problematic territory for the Persian (Iranian) government.³⁷⁵ As stated above, the first division of Kurdistan between the former Persian Empire (modern-day Iran) and the former Ottoman Empire took place in 1514, this partition was formalised when Shah Abbas Safavid signed a treaty with the Ottoman Sultan Murad in 1639. The frontier through this part of Kurdistan has hardly changed ever since.³⁷⁶ Indeed, the Kurds of Iran had been involved in armed struggle against the hegemony of the central government in Isfahan (the old Iranian capital) and later Tehran.³⁷⁷ Since then, both the Ottoman and the Safavids embarked upon establishment of powerful centralised governments, 'a policy that ran counter to the relative freedom of Kurdish principalities and

³⁶⁹ Allain, 'International Law in the Middle East', *op. cit.*, p. 26.

³⁷⁰ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 54.

³⁷¹ Allain, 'International Law in the Middle East', *op. cit.*, p. 26.

³⁷² Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 11.

³⁷³ Allain, 'International Law in the Middle East', *op. cit.*, p. 26.

³⁷⁴ The Official website of the Province of Kordestan, Iran: <http://en.ostan-kd.ir/>

³⁷⁵ A.K.S. Lambton, 'Landlords and Peasants in Persia', I.B. Tauris, 1991, 2nd ed., P. 291.

³⁷⁶ See Rashid Yassemi, *Kurds va payvastegi-e Nejadi va Tarikhi-e Uo* (the Kurds and Their Racial & Historical Bonds), Tehran: Amir Kabir Publications, 1984, pp. 203-209.

³⁷⁷ Ghassemlou, 'Kurds in Iran', *op. cit.*, p. 105.

led to Kurdish revolts.³⁷⁸ One strategy which served successive Persian kings well was the policy of divide and rule, to use tribal hostilities among the Kurds to their advantage.³⁷⁹ By the mid-nineteenth century most of the semi-sovereign Kurdish principalities had come under the direct control of the central government in Iran.³⁸⁰ However, as noticed elsewhere the most significant event of the late nineteenth century which concerned both parts of Kurdistan was Sheikh Obeydullah's uprising in 1880, with the aspiration of uniting the two Ottoman and Persian Kurdish entities. This has been cited as the first modern Kurdish movement with the aim of creating an independent Greater Kurdistan.³⁸¹

After the collapse of the Ottoman Empire the Kurds living in Iran were also affected by the hopes and aspirations of their kinsmen and the events taking place across the artificial border between them and their Kurdish brethren.³⁸² Undeniably there was affinity between the Persian Kurds and their more numerous kinsmen living within the Ottoman Empire.³⁸³ According to Noel, many Kurds from Sulaymaniya left for Iran shortly after the termination of hostilities in World War I to preach the idea of a united Kurdistan.³⁸⁴ There were also some Kurdish tribal leaders in Persia who advocated the creation of the Greater Kurdistan and sought the help of Britain to realise it.³⁸⁵ In fact, the two important Kurdish leaders in Persian Kurdistan, Ismail Agha Simko³⁸⁶ of the Shikak and Sheikh Sayyid Taha of Nehri, were known to be working closely together on a plan for the inclusion of the Persian Kurds in an independent Kurdish state with the help of the British.³⁸⁷ The disintegration of the Ottoman Empire coincided with the weakness of the *Qajar* central government which opened the way for the emergence of Kurdish nationalist feelings in Iran.³⁸⁸ In the early twentieth century, Persia went through its first constitutional revolution in 1906 giving it a constitution and parliament.³⁸⁹ It is worth noting that Iran as a nation is a tapestry of different racial and

³⁷⁸ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 11.

³⁷⁹ For example see, J.R. Perry, 'Karim Khan Zand: A History of Iran, 1747-1779', Chicago U.P., 1979, p. 184-194.

³⁸⁰ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 11-12.

³⁸¹ Ghassemlou, 'Kurds in Iran', *op. cit.*, p. 105.

³⁸² Edmonds, 'Kurdish Nationalism', *op. cit.*, p. 90.

³⁸³ Wadie Jwaideh, 'Kurdish Nationalist Movement', *op. cit.*, p. 138-39.

³⁸⁴ E.W. Noel, (Great Britain Office of the Civil Commissioner, Iraq) 'Note on the Kurdish Situation' (Baghdad: Government Press, 1919) cited in Jwaideh, 'Kurdish National Movements', *op. cit.*, p. 138.

³⁸⁵ E. J. R. Driver, 'Kurdistan and the Kurds', London: Royal Anthropological Institute, 1919, p. 75.

³⁸⁶ He is known as Simitquh by the Iranian historians and media.

³⁸⁷ According to Jwaideh: 'in March 1919, Sayyid Taha went to Baghdad with the object of obtaining the support of the British authorities for such a scheme ... but he failed achieve this objective'; Wadie Jwaideh, 'Kurdish Nationalist Movement', *op. cit.*, p. 139.

³⁸⁸ Chaliand, 'Kurdish Tragedy', *op. cit.*, p. 73.

³⁸⁹ Ahmad Kasravi, *Tārikh-e Mashruteh-ye Iran* (History of the Iranian Constitutional Revolution), in Persian, Negah Publication, 2003.

ethnic groupings.³⁹⁰ Due to power struggle within the government the country was in turmoil and perpetually challenged by regional warlords and tribal leaders especially in the Kurdish inhabited region.

2.5.2 Reza Shah and Iranian nationalism

By the end of World War I, Persia was in administrative and financial chaos, McDowall notes that:

Tribal fighting, anarchy and famine plagued many areas; Gilan was in revolt, both Soviet and British forces were still on Iranian soil; in Tehran the government had fallen as a result of its universally unpopular acquiescence to the 1919 Agreement with Britain which implied protectorate status. By the end of the year Iran's dismal circumstances included the imminent threat that rebel groups in the Caspian region would march on Tehran, backed by the Red Army. Iran seemed weaker than any time in the nineteenth century.³⁹¹

In fact, by the virtue of signing of the 1919 Anglo-Iranian Agreement Iran became a semi-colony of Britain, even though it escaped the Mandate System.³⁹² This created a power vacuum in the region, enabling the Kurdish tribes to once again challenge the Ottoman and Iranian authority in Kurdistan.³⁹³ With the downfall of the *Qajar* imperial system and the rise of constitutional monarchy the new elite in Iran, as in the case of Kemalist Turkey and Iraq, pursued an ultra-nationalist policy based upon centralising and secularising the government.³⁹⁴ By 1921, the Kurds in Iran had to deal with the Iranian forces under the command of Reza Khan (later became Reza Shah in 1925) who had come to power in February of that year in a military coup d'état. It has been noted that 'to stabilize the country and consolidate power, Reza Khan, like the British and Turkish officials, reached out to the traditional stratum tied to imperial structures. Although he repressed tribal revolts with force, Reza Khan permitted the chiefs to retain relative autonomy in their localities.'³⁹⁵

³⁹⁰ W.R. Polk, 'Understanding Iran: Everything you Need to Know, From Persia to the Islamic Republic, from Cyrus to Ahmadinejad', Palgrave-Mcmillan, 2009.

³⁹¹ McDowall, 'A Modern History of the Kurds', *op. cit.*, p. 214; for Gilan revolt see generally, C. Chaqueri, 'the Soviet Socialist Republic of Iran, 1920-21: Birth of the Trauma', Pittsburgh U.P., 1994.

³⁹² S. Bromley, 'Rethinking Middle East Politics', Texas U.P., 1994, p. 82.

³⁹³ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 12.

³⁹⁴ Natali, 'the Kurds and the State', *op. cit.*, p. 117; see also A. Ighbal-Ashtiyani, 'Tarikh-e-Iran (the History of Iran)', Behzad Publications, 2nd ed., 2003, p. 991.

³⁹⁵ Natali, 'the Kurds and the State', *op. cit.*, p. 118.

But, he adopted a different approach to the Kurdish issue. As Natali says: ‘instead of promising Kurdish-Persian fraternity in a future Iranian state or creating committees for the development of southwest Iran, he addressed the Kurds strictly as a tribal community and later criticised foreign governments for stirring rivalry among the Kurdish tribes in Iran.’³⁹⁶ Upon accession to power, one of the central issues on Reza Shah’s agenda was the disarming of all tribal regions across Iran including the Kurdish areas.³⁹⁷ By doing so, he intended to stamp his authority on the country especially in relation to rebellious tribes.³⁹⁸ Consequently, he turned his attention to reorganizing the Iranian army to meet this challenge.³⁹⁹ In spite of this, even his authoritarian regime was not immune from Kurdish revolts which directly challenged his central authority.

2.5.3 Simko’s revolts

The revolt of Ismail Agha Simko’s was the first major challenge to the authority of Iranian government by a Kurdish leader since the end of World War I.⁴⁰⁰ Simko the chief of Shikak tribe who exercised control over the region west of Lake Urmiah was one of the first Kurdish tribal leaders to call for an independent Kurdistan under his leadership.⁴⁰¹ He has been described as one of the most remarkable personalities to emerge in Kurdistan during the World War I.⁴⁰² He came to prominence during the period of constitutional revolution and the ensuing internal turmoil in Iran.⁴⁰³ He succeeded his brother Ja’far Agha, who had been treacherously murdered by the Persian Crown-Prince in 1907.⁴⁰⁴ However Natali opines that: ‘Simko may have occasionally considered himself a nationalist, but his overriding demand was to protect his property rights and local power networks in the shifting early-twentieth-century political context.’⁴⁰⁵ Although Simko was no ordinary leader but he lacked a clear political programme and never managed to administer the territory under his control

³⁹⁶ see also R.M. Burrell, *Iran Political Diaries, 1881-1965*, vols 1-4, 6, 10-11, London Archives Editions, 1997, 6:20 cited in Natali, ‘the Kurds and the State’, *op. cit.*, p. 118;.

³⁹⁷ McDowall, ‘A Modern History of the Kurds’, *op. cit.*, p. 225.

³⁹⁸ Romano, ‘the Kurdish Nationalist Movement’, *op. cit.*, p. 224.

³⁹⁹ Cyrus Ghani, ‘Iran and the Rise of Reza Shah: from Qajar Collapse to Pahlavi Rule’, I.B. Tauris, 2000, P. 386.

⁴⁰⁰ Entessar, ‘Kurdish Politics in the Middle East’, *op. cit.*, p. 17.

⁴⁰¹ Entessar, ‘Kurdish Ethnonationalism’, *op. cit.*, p. 12.

⁴⁰² C.J. Edmonds, ‘Kurds, Turks and Arabs: Politics, Travel and Research in North-Eastern Iraq, 1919-1925’, Oxford U.P., 1957, p. 305.

⁴⁰³ Kasravi, *History of the Iranian Constitutional Revolution*, *op. cit.*, p. 425.

⁴⁰⁴ Jwaideh, ‘Kurdish National Movements’, *op. cit.*, p. 140.

⁴⁰⁵ Natali, ‘the Kurds and the State’, *op. cit.*, p. 22

effectively in order to create an independent state.⁴⁰⁶ In 1918, Simko had refused to link up with Armenians in resisting the Turks and murdered the Assyrian Patriarch Mar Shimun for which he gained notoriety.⁴⁰⁷ In the same year he managed to capture the region between Lake Urmiah and the Turkish border. The acts of violence committed against the Assyrian community earned Simko a fierce reputation as a bandit which prompted the Western powers to deny him support. In the last days of the *Qajar* Dynasty the central government had tried to eliminate him by dispatching the brigade of Persian Cossacks, led by Russian colonel Filipov, which Simko managed to defeat. As a result of this event and due to the weakness of the central administration in Tehran, he managed to exercise a tenuous control over the territory until 1921. The biggest problem facing Simko was that the territory under his control was not only resided by the Kurds but also Azeri-speaking Shi'a and Assyrian Christians, both of whom had been involved in long running conflicts against the Kurds.⁴⁰⁸ The cities of Uromiyeh, Salmas and Khoi which are claimed by the Kurds are predominantly Azeri in composition and had no intention of being part of Simko's Kurdistan.⁴⁰⁹ In October 1921, he moved his headquarters to the old Mukri capital of Sawj Bulaq (Mahabad), where he was reported to publish a newspaper, *Roja Kurd* (Independent Kurdistan), intended to serve as a mouthpiece for Kurdish aspiration.⁴¹⁰

In the meantime, there was a truce maintained between Simko and the central government mainly to give Reza Khan much needed time to set up a powerful central administration and reorganise and modernize the Iranian army as well as addressing his preoccupation with the task of pacifying the disaffected elements in various part of the country.⁴¹¹ The Iranian government:

... Even tried to come to terms with him by holding out the prospect of granting a measure of autonomy to the Persian Kurds ... Simko, however, appears to have become impatient. Taking advantage of the still unsettled condition of the country, the Kurdish leader decided to strike a decisive blow for the realisation of his dream.⁴¹²

The Iranian government signed the now famous treaty of February 1921 with the Soviet Union and then reached an accord with Turkey on 25 October 1922, which completed

⁴⁰⁶ Chaliand, 'Kurdish Tragedy', *op. cit.*, p. 73.

⁴⁰⁷ Chaliand, 'Kurdish Tragedy', *op. cit.*, p. 73; Jwaideh, 'Kurdish Nationalist Movement', *op. cit.*, p. 140.

⁴⁰⁸ McDowall, 'a Modern History of Kurds', *op. cit.*, p. 218.

⁴⁰⁹ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 12.

⁴¹⁰ Jwaideh, 'Kurdish National Movements', *op. cit.*, p. 140, Arnold Toynbee, *Survey of International Affairs, 1925, vol. I: the Islamic World Since the Peace Settlement* (London: Oxford U.P., 1927), 538-39.

⁴¹¹ S.R. Ward, 'Immortal: a Military History of Iran and its Armed Forces', Georgetown U.P., 2009, p. 138.

⁴¹² Jwaideh, 'Kurdish National Movements', *op. cit.*, p. 141.

Simko's isolation.⁴¹³ In summer of 1922, Simko had declared himself in open revolt against the central government and marched on Maragha in which time he reached the widest extent of his power.⁴¹⁴ The Iranian army led by Reza Khan took part in a decisive battle on 25 July 1922, and delivered Simko a crushing defeat in which out of his ten thousand men Simko was left with only a thousand all from his tribe.⁴¹⁵ He fled across the frontier into Kurdish zone of Iraq, and then Turkey, 'in the operations against Simko, Turkey rendered valuable support to the Persian army by sending powerful units to the Turco-Persian frontier. This action on the part of Turkey marked the end of Simko's cooperation with the Turks.'⁴¹⁶ His struggle finally came to an end in 1930, when he was pardoned by Reza Shah who made him governor of Uchnovieh and subsequently his forces assassinated him a few days later.⁴¹⁷ Simko's revolt compared to other Kurdish leaders' was very limited in its territorial scope nevertheless:

... It was the first major attempt by the Kurds to establish an independent Kurdistan in Iran. Despite some initial military success, Simko's ultimate failure to establish a genuine Kurdish nation state has become attributed to his inability to overcome his parochialism and his inability to create a state in the modern sense of the word, with an administrative organisation. He was chiefly interested in plunder and as he could not loot his own tribe or the associated tribes, he raided and tried to dominate non-Kurdish region, like Salmas, Uromiyah, and eventually Khoi reducing the population of this districts to utter ruin and despair.⁴¹⁸

Reza Shah's decisive victory over Simko and other tribal leaders heralded a new repressive era for the Kurdish population of Iran in that he created a centrally controlled administration based on national unity of all Iranian peoples, an artificially imposed Persian consciousness that was fronted by the so-called Society for Public Guidance.⁴¹⁹

2.6 The Kurdish Mahabad Republic of 1946

The most serious Kurdish challenge to authority of the three sovereign states under consideration was the creation of the Kurdish Republic of Mahabad under the Soviet Union's

⁴¹³ Gunter, 'A to Z of the Kurds', *op. cit.*, p. 188.

⁴¹⁴ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 12.

⁴¹⁵ Chaliand, 'The Kurdish Tragedy', *op. cit.*, p. 74.

⁴¹⁶ Jwaideh, 'Kurdish National Movements', *op. cit.*, p. 141.

⁴¹⁷ See for example, Ghassemlou, 'Kurdistan in Iran', p. 117; Kinnane, 'the Kurds and Kurdistan', *op. cit.*, p. 47.

⁴¹⁸ Arfa, 'the Kurds: an Historical and Political Study', Oxford U.P., 1966, p. 63-64.

⁴¹⁹ One of the main purposes of the Society for Public Guidance was to rid Persian of foreign phrases especially Arabic and replace them with Persian equivalent. J.S. Szyliowicz, 'Education and Modernisation in the Middle East, Ithaca, NY: Cornell U.P., 1973, p. 243-244.

auspices.⁴²⁰ The Anglo-Soviet invasion of Iran in September 1941 resulted in the collapse of the pro-German Reza Shah's administration throughout tribal areas including Iranian Kurdistan, which was divided into three zones.⁴²¹ The northern zone was under Soviet occupation, the southern zone under British control and crucially the middle one was left under Kurdish control as a buffer zone between the two occupying forces.⁴²² In their attempt to annex the northern part of Iran (at the time under their occupation) to the Soviet Union, nationalist ferment was actively promoted by the Soviets in both the Azerbaijani and Kurdish areas of Iran.⁴²³ One of the consequences of this collapse was the Kurds seizure of vast quantities of arms and ammunition left behind by the retreating Iranian forces before the advancing Soviet Army.⁴²⁴ The invasion of Iran by the Allies put a stop to continuation of Reza Shah's draconian tribal policies. Reza Shah was merciless and unrelenting in his suppression of native institutions; not even native dresses were immune from this practice.⁴²⁵ The Persian Kurds who resented Reza Shah's tribal policy were now in a position to reverse such draconian measures. Since, for almost two decades, the Kurds had been forced to submit to the Shah's despotic rule and his officials' corrupt practices with no hope of remedy for the injustices suffered by the Kurds.⁴²⁶ Because of this void the Kurds showed the willingness to break away from the Iranian unitary system.⁴²⁷ The zone held by the Kurds was to become a centre of Kurdish political activities. Free from outside control they embarked upon all things they had been denied and boldly sought to gain their autonomy.⁴²⁸ However, it was in the town of Mahabad, within the territory inhabited by Iranian Azeris that the most significant Kurdish political developments were to take place.⁴²⁹ On 16 August 1943, a group of young Kurdish merchants, intellectuals and petty officials of the town of Mahabad established *Komala-i-Zhian-i-Kurd*, or "Committee of Kurdish Youth" which eventually transformed

⁴²⁰ W. L. Westermann, 'Kurdish Independence and Russian Expansionism', *Foreign Affairs*, vol. 24, 1945-46, pp. 675-686, P. 767; Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 14.

⁴²¹ Jwaideh, 'Kurdish National Movements', *op. cit.*, p. 243.

⁴²² Ghassemlou, 'Kurds and Kurdistan', *op. cit.*, pp. 105-106.

⁴²³ Allain, 'International Law in the Middle East', *op. cit.*, p. 27.

⁴²⁴ Elphinston notes: "in addition to the large military stores seized by the Kurdish tribesmen", 'the Kurdish Question', *op. cit.*, p. 97; A. Roosevelt, 'the Kurdish Republic of Mahabad', *Middle East Journal* 1, no. 3 (July 1947), p. 248.

⁴²⁵ According to Roosevelt, "the Kurds like other Iranians forced to abandon their native dress by Reza Shah, kept their cloths hidden in their homes, a symbol of their national pride, until the Allied invasion, when they suddenly blossomed out in them", *ibid*, p. 251.

⁴²⁶ Jwaideh, 'Kurdish National Movements', *op. cit.*, p. 243.

⁴²⁷ Roosevelt, 'the Kurdish Republic of Mahabad', *op. cit.*, p. 248.

⁴²⁸ Jwaideh, 'Kurdish National Movements', *op. cit.*, p. 245.

⁴²⁹ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 16.

itself into KDP-I (Kurdistan Democratic Party of Iran).⁴³⁰ In fact, ‘the Komala spread rapidly, not only in Iran but in other countries as well, where Kurds saw in the new group a more vigorous force than in the traditional Kurdish nationalist parties.’⁴³¹ This development heralded a change of policy in Kurdish nationalist movements in that urban intellectuals played a pivotal role above and beyond tribal objectives. Nevertheless, ‘Iranians quite naturally feared autonomy as the first step in a move toward separation and then amalgamation with Kurds from other lands under Soviet sponsorship.’⁴³² In the meantime, the KDP-I managed to secure the tacit support of the Soviet authorities for the creation of an autonomous Kurdish republic.⁴³³ However, the eventual leader of Mahabad Republic Qazi Mohammad did not join the aforementioned political party until October 1944, but he very quickly became its dominant personality.⁴³⁴ Subsequently, a cabinet was convened by Qazi Mohammad consisting of mainly tribal chiefs, merchants and urban intellectuals.⁴³⁵ The cabinet carefully maintained relations with both, the central government and the Soviets in Azerbaijan and *de facto* performed many of the functions of a local government.⁴³⁶ It should not be forgotten that, the Soviets provided military training to the traditional Kurdish forces, although their financial support was rather meagre.⁴³⁷ This led to the issuing of a Kurdish manifesto that sought, above all, the following, ‘the Kurdish people in Iran should have freedom and self-government in the administration of their local affairs, and obtain autonomy within the limits of the Iranian state.’⁴³⁸ The military muscle for this tiny republic was provided by the Iraqi Kurdish leader Mullah Mustafa Barzani and his men fresh from their defeat against Iraqi government as well as the assistance of the Soviet Red Army that blocked any Iranian reinforcement from arriving in the region.⁴³⁹ This relative stability enabled Qazi Mohammad to proclaim independence on 22 January 1946, and Kurdish replaced Persian as the official language.⁴⁴⁰ As McDowall says: ‘the idea that the Republic of Mahabad was the

⁴³⁰ KDP-Iran, sought autonomy of Kurdistan within the unitary system of Iran and the recognition of cultural rights, a policy maintained by this political party until now.

⁴³¹ Roosevelt, ‘the Kurdish Republic of Mahabad’, *op. cit.*, p. 250.

⁴³² R.W. Cottam, ‘Nationalism in Iran’, Pittsburgh U.P., 1979, p. 71.

⁴³³ W. Eagleton, ‘The Kurdish Republic of 1946’, Oxford U.P., 1963, p. 64.

⁴³⁴ Chaliand, ‘the Kurdish Tragedy’, *op. cit.*, p. 75.

⁴³⁵ Eagleton, ‘The Kurdish Republic of 1946’, *op. cit.*, p. 67.

⁴³⁶ Keesing’s Record of World Events (formerly Keesing’s Contemporary Archives), Volume VI, January, 1946 Iran, Page 7669

⁴³⁷ Westermann, ‘Kurdish Independence and Russian Expansionism’, *op. cit.*, p. 684.

⁴³⁸ The Republic of Mahabad’s Manifesto has been reproduced in Roosevelt, ‘the Kurdish Republic of Mahabad’, *op. cit.*, p. 255.

⁴³⁹ Eagleton, ‘The Kurdish Republic of 1946’, *op. cit.*, p. 55.

⁴⁴⁰ Chaliand notes that: “During the few months of its existence the Mahabad Republic established the foundations of a Kurdish administration. Thus, for the first time, education was officially in Kurdish, and a Kurdish press began to develop,” Chaliand, ‘the Kurdish Tragedy’, *op. cit.*, p. 75.

critical moment at which the Kurds realised their freedom is arguably a rosy version of reality ... it never had a hope without serious Soviet support and the republic's leaders knew in their hearts that such support was not dependable'.⁴⁴¹ By April 1946, the Soviet Union declared to the newly established United Nations Security Council that it was negotiation with Iran for the evacuation of "its troops as rapidly as possible" from northern Iran.⁴⁴² Hence, this sealed the death knell of the only republic in the history of Kurdish people. With the withdrawal of the Soviet forces, the Iranian Army soon recaptured the Kurdish republic. As expected the leaders of the demised republic were summarily tried and Qazi Mohammad and some of his close allies were hanged at the same square he had declared the republic. Mullah Mustafa Barzani, perhaps one of the most charismatic leaders of Kurdish nationalist movement, fought his way back to Iraq and eventually had to take refuge in the Soviet Union where he spent eleven years in exile.⁴⁴³ However, Chaliand notes that 'Mahabad Republic has remained an important moment in the political history of Kurdistan, in particular with the formation of the KDP-I, and via Barzani, KDP-Iraq the parties that had been at the heart of the nationalist struggle in their two countries up until the present day.'⁴⁴⁴ Hence, the fate of Iranian Kurdish nationalism, as in Turkey and Iraq, was not to find expression in autonomy or independence but in repression.

2.7 A United front against the Kurds: Treaty of *Saadabad* of 1937

These armed revolts were sufficiently serious for the sovereign states of Turkey, Iraq and Iran to persuade them to conclude the Treaty of *Saadabad* on 8 July 1937,⁴⁴⁵ the purpose of which although not specifically stated, was to ensure co-operation in tackling the menace of Kurdish armed revolts. According to Article 7 of the said Treaty:

Each of the High Contracting Parties undertakes to prevent, within his respective frontiers, the formation and activities of armed bands, associations or organisations to subvert the established institutions, or disturb the order or security of any part, whether situated on the frontier or elsewhere, of the territory of another Party, or to change the constitutional system of such other Party.

⁴⁴¹ McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 246.

⁴⁴² United Nations Security Council Resolution 3, 4 April 1946, S/RES/3, 1946; see also Resolutions 2 & 5 related to the Soviet Troops evacuating Iran.

⁴⁴³ McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 248; Eagleton, 'the Kurdish Republic of 1946', *op. cit.*, p. 116-126.

⁴⁴⁴ Chaliand, 'the Kurdish Tragedy', *op. cit.*, p. 76.

⁴⁴⁵ League of Nations Treaty Series, vol. 190, pp. 22-27.

In other words, the Treaty of *Saadabad* was specifically aimed at Kurdish political movements and their armed groups.⁴⁴⁶ Further, it proves beyond shadow of a doubt that how perturbed the three sovereign states were in the armed challenges posed by their Kurdish populations. In the second half of the twentieth century Kurdish NSAGs became mere pawns in the Cold War chess game where the Soviet Union and the United States used the Kurds to maintain their hegemony and vital national interests in the region.⁴⁴⁷

2.8 Kurdistan 1946-1991

2.8.1 After the Mahabad Republic and emergence of Kurdish political parties

The period that followed the demise of the Mahabad Republic, central governments in Iran and Iraq were much weaker militarily compared to the Kemalist regime in Turkey. After the downfall of the Mahabad Republic in 1946 a period of general political repression ensued. Consequently, Kurdish nationalism in Iran and Iraq was taken to pieces but it remained dormant.⁴⁴⁸ Likewise, in Turkey, due to repressive measures and complete news blackout adopted by the Turkish government in eastern Anatolia the Kurdish population remained in check.⁴⁴⁹ In an environment that pan-Turkish nationalism and denial of the Kurdish culture and identity was order of the day.⁴⁵⁰ The Kemalist regime reacted forcefully to any dissent by its Kurdish population. The policy of deportation of the Kurds from their homeland to other parts of the republic was still in progress.⁴⁵¹

Nevertheless, there is no denying that the experience of the Mahabad Republic and self-rule despite its ephemeral span provided the Kurdish populations of these states with the belief that they had to organise themselves as political entities alongside armed resistance.⁴⁵² The Mahabad Republic was also significant since it gave birth to the Kurdish Democratic Party in 1945 formed collectively by Iranian and Iraqi Kurds as a united front against their host

⁴⁴⁶ Vanly, 'Kurdistan in Iraq', *op. cit.*, p.149; see also Edmonds, 'Kurdish Nationalism', *op. cit.*, 91.

⁴⁴⁷ See L. Fawcett, 'Down but not out? The Kurds in International Politics', *Review of International Studies* (2001), 27, 109-118; D. Little, 'The United States and the Kurds: a Cold War Story', *Journal of Cold War Studies*, Vol. 12, No. 4, Fall 2010, pp. 63-98.

⁴⁴⁸ Ghassemlou, 'Kurdistan in Iran', *op. cit.*, p. 110.

⁴⁴⁹ Kendal, 'Kurdistan in Turkey', *op. cit.*, p. 63.

⁴⁵⁰ This is best illustrated by an article in *Son Posta* dated 11 April 1946 which echoed the nationalist view, 'In Turkey no Kurdish minority ever existed either nomadic or settled, with nationalist consciousness or without it'; cited in McDowall, 'A Modern History of the Kurds', *op. cit.*, p. 397.

⁴⁵¹ M. Van Bruinessen, 'Genocide in Kurdistan?', *op. cit.*, p. 152.

⁴⁵² McDowall, 'A Modern History of the Kurds', *op. cit.*, p. 345-6.

states.⁴⁵³ This harmony did not last long. Eventually, mainly due to the external factors a schism emerged leading to the formation of the Kurdish Democratic Party of Iraq (KDP-) and the Kurdish Democratic Party of Iran (KDP-I).⁴⁵⁴ Both parties adopted left-wing oriented programs with the intention of attracting support from the Soviet Union.⁴⁵⁵ It is significant to point out that for the first time in the history of the Kurds they adopted a two-pronged strategy of having a political wing as well as a military one. This was in spite of their initial reluctance to engage in armed struggle against the central governments in Iran and Iraq after the collapse of the Mahabad Republic. Although both parties attempted to create a united front against their rulers, they eventually became hostages to the Cold War game.⁴⁵⁶ It is worth noting that at the time neither of the Kurdish groups in Iran and Iraq harboured any ambitions of secession with the view of setting up their own states, both parties advocated autonomy within the unitary systems of Iraq and Iran.⁴⁵⁷

2.8.2 The Kurds in Iran: the post 1946 era

Following the demise of the Kurdish Republic of Mahabad on the territory of Iran, a period of general political repression began in the Kurdish populated territory of Iran.⁴⁵⁸ Mohammad-Reza Shah's reign was in its early stages and was striving to establish its grip on the instruments of power.⁴⁵⁹ With the defeat of the Kurds in Mahabad the young Shah's government accelerated the disarming policy of non-Persian ethnic groups including the Kurds in order to establish a centralized power structure based on Persian nationalism.⁴⁶⁰ The nascent Iranian government continued suppression of its Kurdish population including any military challenge to its central rule. It was only in the early 1950s with accession of

⁴⁵³ Eagleton, 'The Kurdish Republic of 1946', *op. cit.*, p. 102.

⁴⁵⁴ Yildiz, 'The Kurds in Iraq', *op. cit.*, p. 16.

⁴⁵⁵ The KDP-Iraq at the time was a "Marxist-Leninist inspired party" to quote its programme. Vanly, 'Kurdistan in Iraq', *op. cit.*, p. 149.

⁴⁵⁶ Little, 'the United States and the Kurds: a Cold War Story', *op. cit.*, p. 63.

⁴⁵⁷ E.g. regarding Iraqi Kurds Natali notes that 'Kurdish national sentiment focused on ethnocultural rights: the official recognition of Nowruz, the Kurdish (Persian) New Year; inclusion of Shi'a Kurds, or Failis, within the definition of Iraqi citizenship; and language equality. Territorial separation was not part of Kurdish claims because most Kurds did not see themselves as a separate political entity from Iraq.' Natali, 'The Kurds and the State', *op. cit.*, p. p. 51; in relation to the Iranian Kurds Chaliand states that 'rejecting independence the KDP-Iran wanted to create a socialist society ... the autonomy of Kurdistan within a democratic Iran.' Chaliand, 'The Kurdish Tragedy', *op. cit.*, p. 77.

⁴⁵⁸ According to Ghassemlou, most of the KDP's militants and the Republics cadres were either executed or imprisoned. But the young people were not quiescent for long, right from 1948, clandestine Kurdish publications were being circulated in Mahabad area.' Ghassemlou, 'Kurdistan in Iran', *op. cit.*, p. 110.

⁴⁵⁹ McDowall, 'A Modern History of the Kurds', *op. cit.*, pp. 251-3.

⁴⁶⁰ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 23.

democratically elected Prime Minister Mohammad Mossadegh that there was a great revival of political parties in Iran, including the Kurdish Democratic Party of Iran (KDP-I).⁴⁶¹ By now KDP-I had evolved into a left wing political party that supported and sympathized with Mossadegh's policy of nationalization of the oil industry in Iran.⁴⁶² In the Iranian Parliamentary Elections of 1952, six years after the fall of the Republic of Mahabad the candidate from the KDP-I achieved a landslide majority of more than 85 per cent in the town of Mahabad and its suburbs.⁴⁶³ The period of relative political freedom ended following the downfall of Mossadeq on 19 August 1953 through a British-US sponsored coup d'état.⁴⁶⁴ Consequently, 'the Kurds, who had hoped to attain their minority rights under Mossadegh's leadership, found themselves once again at the mercy of the Shah's authoritarian regime, and the remnants of Kurdish resistance to the Shah's forces were easily overcome.'⁴⁶⁵ The government also declared the election of KDP-I candidate in Mahabad invalid and instead appointed a religious leader as the parliamentary deputy of Mahabad.⁴⁶⁶ Once back in absolute power the Shah eradicated all traces of democracy and democratic movements.⁴⁶⁷ The Kurdish population of Iran in general, KDP-I and their leaders in particular, experienced a new period of virulent repression. This left the KDP-I with no alternative but to continue its activities as an underground movement.⁴⁶⁸ It is worth noting that until then, KDP-I had remained in close association with its sister party the Kurdish Democratic Party of Iraq (KDP). Between 1955 and 1958, KDP-I went through a process of re-organization and Abdul-Rahman Ghassemlou became its leader.⁴⁶⁹ Because of widespread political repression in Iran, KDP-I had to stage their second joint congress with KDP in Baghdad in March 1964.⁴⁷⁰ At the same time, the Iraqi Kurdish leader Mullah Mustafa Barzani had emerged as the undisputed leader of the KDP and also a prominent figure of the Kurdish movement as a whole. On his return to Iraqi Kurdistan after eleven years from exile in the Soviet Union,

⁴⁶¹ E. Abrahamian, 'Iran between Two Revolution', Princeton U.P., 1982, p. 268.

⁴⁶² According to Entessar, 'the Kurdish rank and file support for Dr. Mossadegh's government alienated the Shah and convinced him that the Kurds had to be contained at all costs. For example, in a massive display of support for Mossadegh's crusade to force the Shah to reign and not rule, as stipulated in the Iranian Constitution, Iranian Kurds on August 13, 1953, overwhelmingly voted to limit the Shah's power and make him into a constitutional monarch.' Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 27.

⁴⁶³ *Ibid.*

⁴⁶⁴ See generally, R. Cottam, 'Iran and the United States: A Cold War Case Study', Pittsburgh U.P., 1988, pp. 95-109; K. Roosevelt, 'Countercoup: the Struggle to Control of Iran', McGraw-Hill, 1979; J.A. Bill, 'The Eagle and the Lion: the Tragedy of American-Iranian Relations', Yale U.P., 1988.

⁴⁶⁵ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 27.

⁴⁶⁶ Chaliand, 'the Kurdish Tragedy', *op. cit.*, p. 76.

⁴⁶⁷ McDowall, 'A Modern History of the Kurds', *op. cit.*, p. 251.

⁴⁶⁸ Romano, 'The Kurdish Nationalist Movement', *op. cit.*, p. 230.

⁴⁶⁹ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 27.

⁴⁷⁰ Chaliand, 'the Kurdish Tragedy', *op. cit.*, pp. 77-78.

Barzani had proposed unification of the DKP and KDP-I in order to create a united front under the stewardship of one secretary general namely himself.⁴⁷¹ In order to stamp his authority on this united venture, in the second joint KDP and KDP-I Congress in Baghdad, he managed to exclude certain Iranian Kurdish delegates such as Ghassemlou from taking part in the debate. The disagreement was chiefly due to the rising collaboration between the Barzani-led KDP and the Shah's regime in Iran. Thus, KDP and KDP-I split and established separate revolutionary committees to continue their activities as two separate entities. In its first congress as an independent party, KDP-I proclaimed a manifesto which rejected independence and demanded, 'the autonomy of Kurdistan within a democratic Iran.'⁴⁷² Inspired by Marxism, the KDP-I remained resolutely secular and advocated the creation of a socialist society in Iran, close to the Soviet model.⁴⁷³ The relations between the two Kurdish political movements quickly worsened. By the mid-1960s, KDP was actively supported by the Shah's regime in Iran under the auspices of the US.⁴⁷⁴ The best example of the apparent division between the two Kurdish parties was in 1968, when KDP fighters killed six KDP-I committee members who had sought refuge in Iraq after being attacked by the Iranian army.⁴⁷⁵ Indeed, Iran's 'policy of divide-and-rule had worked, and the Kurds, once again, became the victims of their own misguided and opportunistic leadership.'⁴⁷⁶

2.8.3 Armed revolts against the Shah's regime

After 1946, examples of Kurdish armed struggle against the central government in Iran were very few and far between. However, there were rare incidents in which the Kurds still challenged the authority of the central government. An example of this challenge to the Iranian government's authority took place in 1952, by Kurdish peasants of Bikan, who with the help of KDP-I, rose against the central government under the pretext of revolting against Kurdish feudal landlords and their monopoly on land ownership.⁴⁷⁷ Their uprising quickly gained support and strength.⁴⁷⁸ The Shah's army, with the support of some of the tribal

⁴⁷¹ McDowall, 'A Modern History of the Kurds', *op. cit.*, p. 252.

⁴⁷² Chaliand, 'The Kurdish Tragedy', *op. cit.*, p. 77.

⁴⁷³ Ghassemlou, 'Kurdistan in Iran', *op. cit.*, p. 112.

⁴⁷⁴ D. Little, 'The United States and the Kurds: a Cold War Story', *Journal of Cold War Studies*, fall 2010, No. 4: 63-98, p. 71.

⁴⁷⁵ Ghassemlou, 'Kurdistan in Iran', *op. cit.*, p. 124.

⁴⁷⁶ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 27.

⁴⁷⁷ Chaliand, 'a People without a Country', *op. cit.*, p. 110.

⁴⁷⁸ Ghassemlou, 'Kurdistan in Iran', *op. cit.*, p. 110.

sheikhs ruthlessly put down the revolt, costing much loss of lives and destruction of Kurdish villages in the process.⁴⁷⁹

However, the biggest Kurdish revolt against the Shah's regime took place after the fall of the Premier Mossadeq in 1953. The revolt was instigated by one of the main Kurdish tribes, the formidable but small Jawanrudi tribe based to the north of Kermanshah near the Iraqi border, which until then had maintained a certain degree of local autonomy.⁴⁸⁰ Due to the inaccessibility of their territory the Iranian army had not been able to capture that region previously.⁴⁸¹ The Iranian army launched an all-out attack on their stronghold on 4 February 1956. Kurdish villages were attacked by thousands of soldiers aided by tanks and crucially fighter planes.⁴⁸² Initially they resisted the onslaught but were unable to fight the far more sophisticated weaponry of the Iranian army and in the process the Jawanrudi fortress, the very symbol of their freedom and resistance was bombed to the ground.⁴⁸³ In relation to the Jawanrudi revolt, it has been observed that:

... Like many other Kurdish outbursts, it serves to underline Kurdish grievances and thus inevitably assumed a political complexion. Besides focusing international attention on the Kurds, it provided fresh grist for the mills of nationalist and communist propaganda ... official Iranian sources maintained that the uprising took place when the Jawanrudis, who had been ordered to disarm but refused to do so, proceeded to attack Iranian army garrisons. This action according to Iranian sources, forced the Iranian government to undertake punitive measures.⁴⁸⁴

From this date on until the fall of the Shah in 1979, a state of general unease existed between the Kurds and the Iranian central government. This unease in occasions manifested itself in low-intensity armed skirmishes between the KDP-I fighters and the much superior Iranian army. The apparent collaboration of their once ally KDP led by Barzani with the Iranian government made it even more difficult for the Iranian Kurds to roam with ease across the border to seek refuge in the Iraqi territory. During the armed campaign against the Jawanrudi tribe, as a sign of cooperation between the Iranian and Iraqi governments, the Iraqi army sealed off the border to prevent any excursion into Iraq by the Kurdish fighters. This resulted in complete elimination of all Kurdish fighters involved in the conflict. Furthermore, due to massive military expenditure allied to the economic boom that Iran experienced throughout

⁴⁷⁹ Chaliand, 'a People without a Country', *op. cit.*, p. 110.

⁴⁸⁰ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 27.

⁴⁸¹ Jwaideh, 'Kurdish National Movements', *op. cit.*, p. 270.

⁴⁸² McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 252.

⁴⁸³ Ghassemlou, 'Kurdistan in Iran', *op. cit.*, p. 111.

⁴⁸⁴ Jwaideh, 'Kurdish National Movements', *op. cit.*, p. 270.

the 1960s and 1970s the armed challenge by the Kurds in Iran was reduced to low-intensity guerrilla warfare mainly limited to mountainous regions of the Iranian Kurdistan. The KDP-I armed wing had to limit its operations to hit and run raids against the Iranian army and Gendarmerie. Further, the ruthlessly effective Iranian secret police (SAVAK), through its extensive network in the Iranian Kurdistan suppressed any sign of dissent or manifestation of Kurdish nationalism.⁴⁸⁵ Throughout the 1960s and 1970s SAVAK rounded up many hundreds of Kurds on the basis of expressing Kurdish nationalistic aspirations. Of course, such expression of diversity by the Kurds was the very anathema to the Iranian government's propaganda that all citizens of Iran were part of an Aryan nation.⁴⁸⁶ Ghassemlou has noted that:

National oppression weighed heavily throughout Iranian Kurdistan. The Shah's regime absolutely refused to recognize the existence of a non-Persian Kurdish people whose nation extended beyond the Iranian frontiers. Even the most minimal demand for national rights was very severely repressed. The assimilation policy launched by Reza Shah sought to crush all Kurdish opposition in Iran.⁴⁸⁷

2.8.4 The establishment of the Islamic Republic: a false dawn

After the fall of the Shah on 11 February 1979, and the coming to power of an autocratic regime in Iran under the leadership of Ayatollah Ruhollah Khomeini, the Iranian Kurds faced an entirely different challenge.⁴⁸⁸ This historical event directly affected the Kurds in Iran profoundly.⁴⁸⁹ The Kurdish political groups led by the KDP-I initially welcomed the Islamic revolution enthusiastically and took part in many demonstrations organized by the KDP-I that contributed to the collapse of the Shah's regime. The Kurdish hatred for the Shah's regime had been accentuated by the betrayal of the Iraqi Kurds through the Algiers Agreement of

⁴⁸⁵ A. Manafy, 'the Kurdish Political Struggles in Iran, Iraq and Turkey: a Critical analysis', University Press of America, 2005, p. 49.

⁴⁸⁶ Oriana Fallaci, interview with the Shah in New Republic, 1 December 1973, cited in McDowall, 'the Kurds' (Minority Rights Group, March 1989), *op. cit.*, p. 8.

⁴⁸⁷ Ghassemlou, Kurdistan in Iran, *op. cit.*, p. 115.

⁴⁸⁸ G. Chaliand, 'Iranian Kurds under Ayatollah Khomeini', in 'a People without a Country: the Kurds and Kurdistan', *op. cit.*, p. 211.

⁴⁸⁹ The very nature of the Islamic Republic of Iran is based on teachings of Koran which places *Uma* (Islamic Nation) central to its doctrine in which International Law has no relevance. Khomeini recognised no laws outside Islam as interpreted by him: "all international laws are the product of the syphilitic minds of a handful of idiots and Islam has obliterated all of them. [Islam] recognises no law except its own laws anywhere in the world because they are [of] divine [origin] Islamic laws are eternally fixed and unchangeable"; Khomeini, *Kashf al-Asrar* (Discovering Secrets), cited in A. Taheri, 'the Persian Knight: Iran under the Khomeinist Revolution', Encounter Books, 2009, p. 212-213.

1975.⁴⁹⁰ In the post-revolutionary period, the political vacuum created by the overthrow of the Shah was quickly exploited by the Kurds.⁴⁹¹ After years of suppression by the Shah's regime, the KDP-I began to establish revolutionary councils to manage local affairs. Furthermore, armed Kurdish militias were set up and equipped from the captured arsenal from the Iranian army. It made them an effective military force on the ground by the end of 1980.⁴⁹² Cultural life also began to flourish, Kurdish language publications, which had been banned for three decades, began to appear again.⁴⁹³ What the KDP-I demanded from the new revolutionary government was legalization of itself, recognition of the *de facto* autonomy and self-determination within Iran's borders that it had proclaimed on 3 March 1979.⁴⁹⁴ This was important because the Kurds in Iran are mainly Sunni Muslims and wanted to ensure that the nascent Shiite state would not subject them to any discrimination and denial of their ethnic and religious rights.⁴⁹⁵ In their eyes, this provided them with 'an unrivalled opportunity for Kurdish demands for autonomy far greater than that offered to the men of Mahabad [the Republic of Mahabad], since Soviet or other Great Power interest or physical presence was not involved.'⁴⁹⁶ This was in light of the fact that the incoming Khomeini regime had promised the KDP-I, autonomy for Iranian Kurdistan within the framework of a democratic, secular and federal Iran.⁴⁹⁷ As previously in the case of Ataturk in Turkey and Reza Shah in Iran, promise of autonomy by Khomeini was proved to be a false dawn for the Kurdish population of Iran. In fact, by promising the Kurdish leaders of complete autonomy Khomeini had tried to buy time in order to consolidate his power base.⁴⁹⁸ As Entessar puts it:

Initial Kurdish euphoria over the demise of the Pahlavi monarchy gave way to the bitter realization that Kurdish autonomy demands would go unheeded by the new Islamic Republic ... It became evident that Ayatollah Khomeini's objective of establishing a strong centralized Islamic Republic would clash with the goals of the autonomy-seeking Kurds.⁴⁹⁹

⁴⁹⁰ This will be discussed in more detail below.

⁴⁹¹ G. Chaliand, 'Iranian Kurds under Ayatollah Khomeini', *op. cit.*, p. 211-2.

⁴⁹² McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 261.

⁴⁹³ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 29.

⁴⁹⁴ It was now uncertain what they expected to replace the Shahs regime although the majority wished to see the slogan of KDP-Iran "democracy for Iran and autonomy for Kurdistan" come true; Chaliand, 'Iranian Kurds under Ayatollah Khomeini', *op. cit.*, p. 211.

⁴⁹⁵ Ramano, 'the Kurdish Nationalist Movements', *op. cit.*, p. 234.

⁴⁹⁶ McDowall, 'the Kurds' (Minority Rights Group, March 1989), *op. cit.*, p. 17.

⁴⁹⁷ G. Chaliand, 'Iranian Kurds under Ayatollah Khomeini', in 'a People without a Country', *op. cit.*, p. 210.

⁴⁹⁸ Ramano, 'the Kurdish Nationalist Movements', *op. cit.*, p. 234.

⁴⁹⁹ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 29.

The early promises made by the provisional government of Mehdi Bazargan to the Kurds and other ethnic groupings in Iran that the new constitution would enshrine their cultural and groups' rights according to Iran's obligations to international law proved to be false.⁵⁰⁰ In reality, as far as Khomeini was concerned, demands of autonomy by an ethnic nationality namely the Kurds within the Islamic Republic was basically redundant.⁵⁰¹ In spite of Khomeini's rejection of this idea, the first Constitution of the Islamic Republic by virtue of Article 15 recognized the existence of linguistic diversity within Iran. However, according to the said constitution the only minorities recognized were religious minorities in Iran namely, Christian, Jewish and Zoroastrians and not any other minorities such as the Kurds.⁵⁰² Accordingly, apart from political considerations, religion played a key role in intensifying tension between the Sunni Kurds and the Shi'a leadership in Tehran.⁵⁰³ Hence, calls for autonomy of Kurdistan in the unitary system of Iran by Kurdish Sunni religious leaders such as Sheikh Ezzedin Hussein fell on deaf ears.⁵⁰⁴ It was looked upon as challenging the legitimacy and authority of the new Islamic regime and perceived as a revolt against its authority.⁵⁰⁵ In the meantime, Khomeini consolidated his power base and declared himself the Commander-in-Chief of the armed forces. Moreover, clashes between conservative Kurdish landowners and Peasants who had seized land from the owners because of the power vacuum created by the fall of the Shah's regime, 'reflected deep divisions within Kurdish Society.'⁵⁰⁶

Three weeks after the return of Khomeini from exile, a major armed clash took place near the small town of Bana, between the armed fighters of the KDP-I and militias loyal to the new revolutionary regime in which over a hundred people were killed.⁵⁰⁷ For the next twelve months, there were sporadic clashes between the Kurds and the newly formed volunteer Islamic Revolutionary Guard Corp (IRGC), a government militia which asserted the Islamic

⁵⁰⁰ Iran ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economics, Social and Cultural Rights (ICESCR), in 1975, on the basis of which it is bound by them; see also Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 31.

⁵⁰¹ See D. Menashari, 'Khomeini Policy towards Ethnic and Religious Minorities', in M.J. Esman & I. Rabinovich (ed.) 'Ethnicity, Pluralism, and the State in the Middle east', Cornell U.P., 1988, p. 217.

⁵⁰² See Article 5 of the Islamic Republic of Iran's Constitution; H. Algar, 'Constitution of the Islamic Republic of Iran', Mizan Press, 1980.

⁵⁰³ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 32.

⁵⁰⁴ M.H. Ahmed (ed.), 'the Evolution of Kurdish Nationalism', Mazda Publishers, 2006, p. 263.

⁵⁰⁵ Sheikh Ezzedin Hussein's interview in *MERIP Report*, no. 113 (March-April 1983): 9-10, cited in Entessar, *ibid*; see also A.R. Ghassemlou was elected as a member of the Constitutional Council of Experts securing 80 per cent of the popular vote; C. Prunhuber, 'the Passion & Death of Rahman the Kurd: Dreaming Kurdistan', iUniverse, 2011, p. 291.

⁵⁰⁶ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 35.

⁵⁰⁷ McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 261.

values of the new regime in Tehran.⁵⁰⁸ It is worth noting that the Islamic Revolution had decimated the Iranian army because of its loyalty to the Shah.⁵⁰⁹ The IRGC was created according to Article 150 of the new Constitution, was meant to fill in the void left by the army.⁵¹⁰ At the time of its creation the IRGC generally operated outside of the sphere and jurisdiction of the regular army and the police controlled by the short-lived provisional government of Mehdi Bazargan.⁵¹¹ Because of the lack of cohesion and organization between the new Islamic government and the Iranian armed forces, by and large, most of the Kurdish territory in Iran remained under the control of the armed wing of the KDP-I until 1982.⁵¹² As a result, the Kurdish cities of Mahabad and Sanandaj became the battleground between the KDP-Iran's *Peshmerga* and the IRGC forces. Evidently, the fighting was not limited to these cities and soon other parts of Iranian Kurdistan became the daily scenes of battles between *Peshmerga* aided by some of the left-wing guerrilla forces such as *Fadaiyan* and the *Mujahidin*, and the government forces of the IRGC.⁵¹³

It is worth noting that in the aftermath of the Islamic revolution in Iran, apart from the other left-wing guerrilla armed groups, there was a much smaller Kurdish political movement which called itself Komala⁵¹⁴ (not to be mistaken by 1945-6 Komala political movement), a left-wing Marxist-Leninist organization, whose armed fighters for a short period assisted the KDP-I's *Peshmerga* in its armed campaign against the Islamic regime in Iran.⁵¹⁵ The cooperation between the two Kurdish groups did not continue for long. Until it unilaterally abandoned armed struggle in the early 1990s, due to ideological differences, Komala

⁵⁰⁸ McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 263.

⁵⁰⁹ The army in particular suffered great losses, according to Major General Qarani, the army's Chief of Staff under the Provisional Government commenting on 29 February 1979, 'I inherited an army which in Tehran did not contain even one soldier, and which, because of treachery by some of the former military leaders, had its barracks emptied of arms and in most cases destroyed by fire', cited in A.P. Ostovar, 'Guardians of the Islamic Revolution Ideology, Politics, and the Development of Military Power in Iran (1979-2009)', Proquest, 2011, p. 51.

⁵¹⁰ In fact, by the summer of 1980, the Pasdaran already had ten thousand permanent men and one hundred thousand in reserve; see K.M. Pollack, 'the Persian Puzzle: the Conflict between Iran and America', Random House, 2004, pp. 149-150.

⁵¹¹ F. Wehrey et al., 'the Rise of the *Pasdaran*: Assessing the Domestic Roles of Iran's Islamic Revolutionary Guards Corp', Rand Corporation, 2009, p. 22.

⁵¹² M. Rubin, 'Are Kurds a Pariah Minority?', 70 *Social Research*, 295 (2003); McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 263.

⁵¹³ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 35.

⁵¹⁴ In conjunction with some other Marxist-Leninist organizations in Iran Komala establish 'the Communist Party of Iran', Romano, 'Kurdish Nationalist Movement', *op. cit.*, p. 224-5.

⁵¹⁵ Komala took up arms against the Islamic regime to gain autonomy for Kurdistan in Iran. Hamid Hamidi, '*Ghomiyat va Ghomiyatgarayi dar Iran* (Nations and Nationalisms in Iran), Tehran: New Publishers, 1990, p. 100; Entessar, 'Kurdish Politics in the Middle East', *op. cit.*, p. 50.

regularly engaged in armed skirmishes with the armed wing of KDP-I.⁵¹⁶ Yet another example of the in-fighting between Kurdish NSAGs based in Iran that debilitated their effectiveness in their struggle against the theocratic regime. Eventually, the government dispatched the IRGC to the Kurdish region again in order to put down yet another revolt by the Kurds in Iran. Human rights abuses instigated by the IRGC added much bitterness to the conflict. It is estimated that 10,000 Kurds lost their lives and in many cases the IRGC summarily executed many of the captured Kurdish fighters without trial.⁵¹⁷

In the meantime, on 22 September 1980, Iraq launched a major attack upon Iran resulting in the invasion of a part of the Province of Khuzestan in south-eastern Iran.⁵¹⁸ Faced with the menace of the Islamic government the KDP-I committed the cardinal sin of asking for military and logistical support from the invading Iraqi army.⁵¹⁹ Consequently, the KDP-I was branded by the Islamic regime as traitors and yet causing more soured relations between the Kurds and the central government in Iran.⁵²⁰ The war between Iran and Iraq continued for almost eight years in which the Kurdish political parties and their armed wings became mere proxies yet again to in the Iran-Iraq power-game.⁵²¹ In fact, throughout this war and beyond the Islamic regime in Tehran actively supported the Kurdish groups over the border in Iraq and likewise the Ba'athist regime in Baghdad harboured and assisted KDP-I.⁵²² This, in the case of KDP-I, resulted in loss of credibility among the Kurdish population of Iran. However, it did not stop the KDP-I to continue its armed struggle against the central government in Tehran. In 1982, KDP-I as a principal partner, joined the National Council of Resistance (NCR) formed in Paris by the second president of Iran in the post-Islamic era, Abulhassan Bani-Sadr and the leader of the People's Mujahidin Organization of Iran (PMOI),⁵²³ Masud Rajavi.⁵²⁴ The PMOI was an urban guerrilla organization that in spite of its initial support for

⁵¹⁶ According to Rahmanpanah a member of Komala's central Committee, once the organization realized that the central government was using the existence of armed conflict as an excuse to crack down on the peaceful work of a range of activities Komala decided to abandon armed struggle. Human Rights Watch, Iran: Freedom of Expression and Association in the Kurdish Regions', January 2009, p. 7.

⁵¹⁷ By February 1981, the death toll was estimated at 10'000, *Daily Telegraph*, 11 February 1981 cited in McDowall, 'a Modern History of the Kurds', fn. 2, *op. cit.*, p. 280; see also Amnesty International Report, 'Iran: the Human Rights Abuses against the Kurdish Minority', 2008, p. 5 <<http://www.amnesty.org/en/library/asset/MDE13/088/2008/en/d140767b-5e45-11dd-a592-c739f9b70de8/mde130882008eng.pdf>>.

⁵¹⁸ E. Karsh, *The Iran-Iraq War*, Rosen Publishing, 2008, p. 20; see also N. Ashton & B. Gibson, 'the Iran-Iraq War: New International Perspectives', Routledge, 2012.

⁵¹⁹ Gunter, 'A to Z of the Kurds', *op. cit.*, p. 78.

⁵²⁰ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 39.

⁵²¹ Ahmed, 'the Evolution of Kurdish Nationalism', *op. cit.*, p. 101.

⁵²² Ibid.

⁵²³ The Organization is also known as the Mujahedin-e-Khalq Organization (MKO); generally see E. Abrahamian, 'the Iranian Mojahedin', Yale U.P., Reprint Edition, 1992.

⁵²⁴ S. Zabih, 'Iran since the Revolution, Johns Hopkins U.P., 1982, p. 90.

the Islamic regime was engaged in armed struggle against it.⁵²⁵ But just prior to the PMOI setting up base in Iraq under the auspices of Saddam's Government in Iraq at the height of Iran-Iraq War, in 1987, DKP-I left the NCR citing political differences with the organization. This left the KDP-I very marginalized since this left it bereft of no regional or global allies. Consequently, it had to concentrate on self-preservation and survival. Its leaders on the other hand had to go into exile in Western Europe. In due course, they would meet a tragic end to their lives in what has been described as an act of state terrorism perpetrated by the Islamic regime in Iran.⁵²⁶

2.8.5 State terrorism: assassinations of Kurdish leaders in Europe

In the late 1990s, KDP-I suffered a series of assassinations against its leaders allegedly perpetrated by the leadership of the Islamic Republic in Iran.⁵²⁷ At least in one case Iranian leaders have been directly implicated in organizing and carrying out the assassination. KDP-I suffered a major blow when its incumbent leader Ghassemlou was assassinated on 13 April 1989, in a Vienna apartment while negotiating with the representatives of the Islamic Republic regime.⁵²⁸ Along with Ghassemlou two of his Kurdish party colleagues were also assassinated and an Iranian diplomat Mohammad Jafar Shahroudi who was wounded. It has been reported that one of the members of the Islamic Republics delegation (accidentally injured in the attack) was a high-ranking member of the IRGC.⁵²⁹ Significantly, the Iranian authorities refused to allow the Austrian Police to interview those who were alleged to have been involved in the assassination.⁵³⁰ Ghassemlou was succeeded by Sadeq Sharafkandi as the new Secretary General of the KDP-I. Three years later, on 17 September 1992, in a disconcertingly similar manner to that of the previous Kurdish leader's assassination Sharafkandi, along with the KDP-I's European and German representatives and four other Iranian dissident leaders were assassinated in the Mykonos restaurant in Berlin.⁵³¹ The significance of the verdict handed down in a German court is that for the first time a foreign

⁵²⁵ In the course of Iran-Iraq War, Iraq supported Iranian Dissident groups particularly the PMOI and KDP-Iran. Ervand Abrahamian, 'the Iranian Mujahidin', Yale U.P., 1992, p. 248.

⁵²⁶ G. Sick, 'Iran: Confronting Terrorism', *the Washington Quarterly*, 26(4) autumn 2003, p. 86.

⁵²⁷ C.C. Harmon, 'Terrorism Today', Routledge, 2nd Edition, 2007, p. 119.

⁵²⁸ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 41.

⁵²⁹ On his return to Iran Shahroudi stated in a newspaper interview that the assassination was an act of terrorism perpetrated by the enemies of the Islamic regime and he intended to cooperate fully with the Austrian police but never to return there; *Keyhan* (Published in Tehran), 28 July 1989, cited in *ibid*, p. 42.

⁵³⁰ Kreyenbroek, *et al.*, 'the Kurds: a Contemporary Overview', *op. cit.*, p. 150.

⁵³¹ Entessar, 'Kurdish Politics in the Middle East', *op. cit.*, p. 49.

court directly implicated the highest echelons of the Islamic Republic's Government for this crime.⁵³² The German court implicated the Supreme Leader Ali Khamenei, the then President Rafsanjani, and the then Minister of Intelligence Ali Fallahian as directly involved in the crime.⁵³³ In the above case, it was said that the Mykonos restaurant assassination was masterminded and authorized by the Islamic Republic's powerful Special Affairs Committee, at the time headed by Supreme Leader Khamenei and included Ali-Akbar Hashemi Rafsanjani, Minister of Intelligence Ali Fallahian and Foreign Minister Ali-Akbar Velayati. The said Committee was set up after the death of Ayatollah Khomeini in 1989 to make decisions on important matters of state.⁵³⁴ Such acts have become an inseparable part of the regime's *modus operandi* in eliminating its enemies abroad.⁵³⁵ It is believed that between 1979 and 1994, more than sixty of the opponents of the Islamic regime have been assassinated in Western countries.⁵³⁶ Most of these assassinations were carried out by its agents in Western Europe and the members of Hezbollah, the southern Lebanese NSAG sponsored by the Islamic regime.⁵³⁷

10 April 1997 witnessed the conclusion of the Mykonos case in the Berlin Appeal Court. An Iranian, Kazem Darabi, was sentenced to life imprisonment and his four Lebanese accomplices were also found guilty of being accessory to the murder of the Kurdish leaders and sentenced to lengthy imprisonments.⁵³⁸ The presiding judge Frithjof Kubsch in his decision held that the trial had proved beyond reasonable doubt that 'Iran's political leaders had ordered the crime'.⁵³⁹ The judge noted:

The previous statements make it clear, that the assassination of the leaders of KDP-Iran under Dr Sharafkandi, was neither the act of an individual, nor caused by conflicts

⁵³² Mykonos Urteil [Mykonos Judgment], Urteil des Kammergerichts Berlin vom 10. April 1997 [Judgement of the Court of Appeal of Berlin on April 10, 1997], OLGSt Berlin, (1) 2 StE 2/93 (19/93), at 22-23 <http://www.kammergericht.de/entscheidungen/Strafsenate/1_StE_19-93.pdf>. (hereinafter Mykonos Judgment).

⁵³³ See witness statement of Abolghassem Mesbahi (witness C) on Sep. 26, 1996. *SYSTEM-I JINAYATKAR:ASNAD-I DADGAH-I MIKUNUS* [Criminal System: Documents of the Mykonos Case] 171 (Mihran Payandih et al. trans. 2000).

⁵³⁴ See also *PARVIZ DASTMLACHI, RISHIHAY-I IDIULUZHAK TERURISM-I VELAYAT-I FAQIH VA ASNAD-I MYKONOS* [The Ideological Roots of Terrorism of the *Velayat-i Faqih* and Mykonos Documents], 56 (1997), quoting Abdolhassan Banisadr's (the former Iranian President) testimony to the Mykonos court.

⁵³⁵ The other high profile victim of this campaign of terror was Shahpour Bakhtiyar the last Prime-minister of the Shah's regime assassinated in Paris in 1991; Sick, 'Iran: Confronting Terrorism', *op. cit.*, p. 86.

⁵³⁶ Harmon, 'Terrorism Today', *op. cit.*, p. 119.

⁵³⁷ Iran uses NSAGs as a central component of its foreign policy since its inception; generally see K.A. Petty, 'Veiled Impunity: Iran's Use of Non-State Armed Groups', 36 *Denv. J. Int'l L. & Pol'y* 191 2007-2008, p. 193.

⁵³⁸ Iran: "Mykonos" Trial Provides Further Evidence of Iranian Policy of Unlawful State Killings, Amnesty International 10 April 1997 <<http://www.amnesty.org/en/library/asset/MDE13/015/1997/en/103b4ccf-ea83-11dd-b05d-65164b228191/mde130151997en.pdf>>.

⁵³⁹ CNN Worldview: Germany Isolates Iran after Accusing Leaders of Killings (CNN Television Broadcast, 10 April 1997).

within the opposition groups themselves. Rather, the assassination is the result of the work of the rulers of Iran ... the evidence makes it clear that the Iranian rulers, not only approve of assassinations abroad and that they honour and reward the assassins, but they themselves plan these kinds of assassinations against people who, for purely political reasons, become undesirable. For the sake of preserving their power, they are willing to liquidate their political opponents.⁵⁴⁰

It has been noticed that for the first time in the German legal history a higher court has attributed responsibility in a murder crime to another state.⁵⁴¹ Ever since the assassination of the KDP-I leaders there has been accusation of involvement of some of the top Iranian political leaders such as the incumbent Iranian President Ahmadinejad.⁵⁴² It is submitted that by performing such acts of terror through its agents and proxies in Western Europe, the implication is that the Islamic regime in Tehran had ‘effective control’ over the deprivation of life, even when the killing of the Kurdish leaders occurred away from the territory of Iran in contravention of its ICCPR obligations.

2.9 The Kurds in Iraq: the Post-1946 Era

2.9.1 The End of monarchy and the war of 1961

The late-1950s witnessed a period of political uncertainty in Iraq that was to have lasting effect on its Kurdish population. In 1958 a group of military officers (the so-called Free Officers) under the leadership of Abdul Karim Qasim staged a bloody military coup d’etat toppling the monarchy of King Faisal and established a republic.⁵⁴³ Initially the Kurds welcomed this change and came to his side and assisted Qasim to strengthen his position.⁵⁴⁴ In return, Qasim pledged to grant the Kurds autonomy, by setting up a three-man “sovereignty council” led by a Kurd Khalid Naqshabandi.⁵⁴⁵ The new regime also promised to transform the life of the Kurds by acknowledging them as a distinct ethnic group with

⁵⁴⁰ Mykonos Judgement, *op. cit.*, at 386-70.

⁵⁴¹ Mary Williams Walsh, *German Court Finds Iran’s Leaders Ordered Slaying*, the L.A. Times, 11 April 1997.

⁵⁴² ‘Austria Probes Iran’s Ahmadinejad’, BBC, 5 July 2005
<http://news.bbc.co.uk/1/hi/world/middle_east/4653513.stm>.

⁵⁴³ Entessar, ‘Kurdish Ethnonationalism’, *op. cit.*, p. 58.

⁵⁴⁴ Yildiz, ‘The Kurds in Iraq’, *op. cit.*, p. 16.

⁵⁴⁵ McDowall has described a three-man ‘Sovereignty Council’ as a token gesture to the Kurds. McDowall, ‘A Modern History of the Kurds’, *op. cit.*, p. 302.

national rights.⁵⁴⁶ In October 1959, Qasim welcomed Mullah Mustafa Barzani back to Iraq after eleven years of exile from the Soviet Union and legalised KDP in January 1960.⁵⁴⁷ Return of Barzani coincided with him assuming the leadership of KDP and setting about reinvigorating the Iraqi Kurds political and military fortunes. Mullah Mustafa's alliance with the Iraqi government allowed him to settle old scores especially with the Kurdish tribes that had helped the monarchy against him in the 1930s and 1940s.⁵⁴⁸ As Van Bruinessen notes:

Traditionally the dividing line among the Kurdish tribes in Iraq was whether they were on the government's side or fighting against it. Additionally, urban Kurdish politicians have in occasions 'turned against the mainstream of the Kurdish movement and reached agreements with the central governments under the pretexts that were unintelligible and unacceptable to the tribesmen. Both groups suspect the other of inherent tendencies to betrayal – and both have a few convincing instances to cite.'⁵⁴⁹

As Qasim consolidated his position, he considered the mobilization of the Kurds by Barzani as a threat to his central authority and reneged on the promise of autonomy for the Kurds and to counterbalance Barzani's power, provided his rivals with arms and financial support.⁵⁵⁰ Further, he showed his true hostile intentions towards the Kurds by issuing a series of decrees that threatened Kurdish tribal leaders economically and politically.⁵⁵¹ This hostile political posturing by the Iraqi central government was to embitter relations between the Sunni Arab leaders of Iraq and its Kurdish population and resulted in a series of revolts led by Mullah Mustafa Barzani for the next two decades.⁵⁵²

2.9.2 First Barzani revolt 1961-70

In September 1961 the Kurds under the leadership of Mullah Mustafa Barzani launched a surprised attack against the Iraqi army with a force of between 5000-15000 men and in two weeks managed to occupy the whole of Iraqi Kurdistan.⁵⁵³ The second division of the Iraqi army counter attacked across Kurdistan pushing out along the major roads and they

⁵⁴⁶ This was to be achieved by promulgation of a provisional constitution which was never implemented. Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 59.

⁵⁴⁷ Natali, 'The Kurds and the State', *op. cit.*, p. 49.

⁵⁴⁸ E. Ghareeb, 'The Kurdish Question in Iraq', Syracuse U.P., 1981, p. pp. 38-39.

⁵⁴⁹ M. Van Bruinessen, 'The Kurds between Iran and Iraq' *MERIP Middle East Report* 16, no. 4 (July-August 1986), p. 16.

⁵⁵⁰ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 62.

⁵⁵¹ According to Tripp, 'this was true insofar as a number of tribal leaders had already been in a state of rebellion because of land reform laws.' C. Tripp, 'A History of Iraq', Cambridge U.P., 2007, p. 163.

⁵⁵² Chaliand, 'the Kurdish Tragedy', *op. cit.*, p. 58; Vanly, 'Kurdistan in Iraq', *op. cit.*, p. 152-3.

⁵⁵³ E. O'Ballance, 'Kurdish Revolt: 1961-1970', Faber & Faber, 1973, pp. 85-91.

consistently kept to the lowlands.⁵⁵⁴ The Kurds were unprepared for serious combat and retreated quickly to the mountains for the winter.⁵⁵⁵ On March 1962, Barzani's winter offensive began as a surprise that inflicted heavy casualties on the Iraqi army.⁵⁵⁶ By 1963, Mullah Mustafa's *peshmargas* succeeded in keeping the Iraqi Army and their primary Kurdish adversaries, the pro-Baghdad tribes at bay.⁵⁵⁷ Mullah Mustafa's guerrilla tactics in the mountainous terrain of Kurdistan had apparently frustrated and fatigued Iraqi forces.⁵⁵⁸ Consequently, in January 1963, the two sides agreed to sign a cease fire.⁵⁵⁹

On 8 February 1963, a bloody Military coup was staged by the Baathists and Arab nationalist officers led by Abdul-Salam Arif (a non-Baathist), removed and executed Abdul-Karim Qasim and his close allies. It is worth noting that Arif a military officer was very much a figure head in the incoming administration and the Baathists were the primary moving force in this affair.⁵⁶⁰ The new Ba'athists regime established a rule of terror to eliminate their opponents such as the Iraq Communist Party members and their sympathizers who were totally exterminated. This coup took place as a reaction to the heavy casualties that the Iraqi army had sustained in the previous winter against the Kurds.⁵⁶¹ As a reaction to the coup Barzani offered a truce which the Baathists accepted willingly in order to buy them some time to strengthen their position of power.⁵⁶²

On February 15 1963, Colonel Aref promoted himself to the rank of field marshal and asked the Kurds to support his regime. In the new cabinet, the Ba'athists held twelve of the twenty seats, and the Kurds held two.⁵⁶³ This situation prompted some Kurds to expect that the Ba'athists would grant instant and extensive recognition to the Kurds as a sign of their obligation to the Kurdish cause.⁵⁶⁴ The Kurds demanded the establishment of an 'autonomous Kurdish government, the evacuation of Kurdish territory by Iraqi troops and an equitable

⁵⁵⁴ Pollack, 'Arabs at War: Military Effectiveness', Nebraska U.P. , 2004, p. 157.

⁵⁵⁵ *ibid*

⁵⁵⁶ McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 309-313, Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 63.

⁵⁵⁷ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 63.

⁵⁵⁸ D. Adamson, 'The Kurdish War', Allen & Unwin, 1964, pp. 108-110

⁵⁵⁹ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 63.

⁵⁶⁰ C. Hunt, 'History of Iraq', Greenwood Press, 2005, pp. 82-83.

⁵⁶¹ The Baathists in particular were very handed against their opponents particularly the Communists and eliminated nearly 7000 thousands of them with the information provided by the CIA. H. Rositzke, 'The CIA Secret Operations: Espionage, Counter-espionage and Covert Action', Boulder, 1977, pp. 109-110; see also Entessar, 'Kurdish Ethnonationalism', p. 64.

⁵⁶² Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 64.

⁵⁶³ Generally see M. Farouk-Sluglett & P. Sluglett, 'Iraq since 1958: from Revolution to Dictatorship', Tauris, 2001.

⁵⁶⁴ *Ibid*.

division of state revenue, especially oil royalties, between the Kurds and Arabs.⁵⁶⁵ On 10 March 1963, the Baathist government announced that an agreement had been reached to grant the Kurds autonomy within the structure of the Iraqi state.⁵⁶⁶ In the meantime, in 1963, there was a split between the nationalist officers led by Arif and the Baathist Party within the Iraqi government that resulted in the removal of Baathist Prime Minister Ahmed Hassan al-Bakr.⁵⁶⁷ One of the main repercussions of this split in the Iraqi government was the breakdown of autonomy talks in October 1964.⁵⁶⁸ This also resulted in resumption of hostilities between the Kurds and the Iraqi forces which attempted to cut off the main Kurdish supply route of Hamilton road to Iran. The Kurdish forces ultimately managed to repel the Iraqi forces and maintain their hold on the Kurdish populated territory.⁵⁶⁹

The tumultuous political events continued at pace in Iraq with the death of Abdul-Salam Arif in a helicopter accident who was succeeded by his brother Abdul-Rahman Arif, who concluded a cease fire agreement with a guarantee of autonomy for the Kurds on 29 June 1966, nearly fulfilling all the Kurd's demands.⁵⁷⁰ The new Iraqi president was perfectly aware of the Iraqi army's weakness in quelling the Kurdish threat mainly due to the shock of the Six Day War humiliation against Israel in 1967 and the inability of the Iraqi army to seal off the border with Iran the main source of supply to the Kurd. It should be pointed out that after the demise of Qasim's government the Shah's regime in Iran had begun supplying the Kurds with modern weaponry.⁵⁷¹

In July 1968, Arab nationalists and Baathist army officers organized yet another coup, which sent Abdul-Rahman Arif into exile and established Ahmed Hassan al-Bakr as the new president.⁵⁷² The new Baath government reiterated the promise of granting autonomy to the Kurds yet again to strengthen its position.⁵⁷³ The Baath administration attempted to weaken Barzani's position within the Kurdish community by supporting his opposing tribes headed

⁵⁶⁵ This was a statement by the Committee for the Defence of the Kurdish Peoples Rights based in Lausanne, Switzerland issued on 12 February 1963 reproduced in Entessar, 'Kurdish Politics in the Middle East', *op. cit.*, p. 84.

⁵⁶⁶ Baathist Premier Al-Bakr created a constitutional amendment stating that the Iraqi people consist of two main nationalities: Arab and Kurds. Natali, 'the Kurds & the State', *op. cit.*, p. 57. McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 314; Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 65.

⁵⁶⁷ Vanly, 'Kurdistan in Iraq', *op. cit.*, p. 152.

⁵⁶⁸ Ibid.

⁵⁶⁹ Chaliand, 'Kurdish Tragedy', *op. cit.*, p. 60; McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 317.

⁵⁷⁰ Entessar, p. 68; Chaliand, 'Kurdish Tragedy', *op. cit.*, p.60; McDowall, p. 318.

⁵⁷¹ By 1966, Iran supplied 20 per cent or more of the Kurds requirements. Israel also assisted and supplied Mullah Mustafa Barzani's forces especially in light of the fact that the Kurds a non-Arab minority had remained neutral in the Six Day War. See B. Beit-Hallahmi, 'the Israel Connection: Whom Israel Arms and Why', I.B. Tauris, 1988, p.

⁵⁷² Entessar, 'Kurdish Politics in the Middle East', *op. cit.*, p. 88.

⁵⁷³ McDowall, 'a Modern history of Kurdistan', *op. cit.*, p. 324.

by Jalal Talebani and Ibrahim Ahmad.⁵⁷⁴ However, on 11 March 1970, a 15-point peace Accord between the Baathist government and Barzani was reached.⁵⁷⁵ Some scholars have attributed the making of this concession by the government to the Kurds due to weak Ba'athist administration in Baghdad, tension with Iran, and more importantly the pressure put on the Iraqi government by the Soviet Union to reach an agreement with the Kurds.⁵⁷⁶ This agreement provided at least in theory the legal framework for broader Kurdish autonomy within the Iraqi unitary system and to give them representation in the executive and legislative bodies of the central government.⁵⁷⁷ The Accord in point 10 recognized Kurdish as an official language and amended the Constitution to state that "the Iraqi people is made up of two nationalities, the Arab nationality and the Kurdish nationality."⁵⁷⁸ This Accord also authorized the Kurdish forces to keep their heavy weapons for four years, until the accord was to be fully implemented.⁵⁷⁹ According to Harris, 'this agreement marked a high-water of Kurdish gains ... Not only was Baghdad forced to acknowledge its inability to crush Barzani's movement, Mullah Mustafa's opponent in the Democratic Party of Kurdistan were obliged to recognize his paramountcy as well.'⁵⁸⁰ Nonetheless, behind the scenes in order to off-set the demography of the Kurdish region, the Iraqi government embarked on a program of Arabization of the oil rich regions of Kirkuk and Khanaqin during the same period.⁵⁸¹ Of particular interest to this study is the use of chemical weapon by the Iraqi army against the Kurdish civilians during the few months of armed conflict in the Iraqi Kurdistan in 1969. According to Chaliand:

During those few months of war, the Iraqi army conducted a number of operations against civilians. For instance, on 19 March 1969, the inhabitants of the village of Dokan in the Shaykhan district were asphyxiated when Iraqi soldiers lit fires at the entrance to the grotto in which they were hiding. Sixty-seven women, children old people were killed. In September 1969, the village of Serija in Zakho district was

⁵⁷⁴ Ibid.

⁵⁷⁵ Ibid.

⁵⁷⁶ It is worth mentioning that by this time the Soviet Union had become the Cold War ally of the Ba'athist regime and their main supplier of military hardware; G.A. Harris, 'Ethnic Conflict and the Kurds', *Annals of the American Academy of Political & Social Science*, Vol. 433, Ethnic Conflict in the World Today (Sep., 1977), 112-124, p. 120.

⁵⁷⁷ The 15-point 11 March 1970 Peace Accord between Barzani and the Ba'athist regime is reproduced in Vanly, 'Kurdistan in Iraq', *op. cit.*, pp. 153-155.

⁵⁷⁸ McDowall, 'a Modern history of Kurdistan', *op. cit.*, p. 328.

⁵⁷⁹ Harris, 'Ethnic Conflict and the Kurds', *op. cit.*, p. 120.

⁵⁸⁰ Ibid.

⁵⁸¹ See Human Rights Watch, 'Forced Arabization of Northern Iraq' <<http://www.hrw.org/reports/2004/iraq0804/4.htm>>

surrounded and then destroyed by a column of tanks. Among the Chaldaean population not a single person survived.⁵⁸²

2.9.3 The Second Barzani revolt of 1974-75

After four years of broken promises, the Kurds resumed their armed conflict against the Iraqi armed forces now firmly under the control of Saddam Hussein who by now had supplanted the figure-head ruler Ahmed Hassan al-Bakr.⁵⁸³ Furthermore, in 1974 the Iraqi government had unilaterally announced a new Autonomy Law that granted the Kurds fewer national rights than the 1970 agreement had stipulated.⁵⁸⁴ The inclusion of a Treaty of Friendship between the Iraqi government and the Soviet Union in April 1972 left Barzani with no choice but to seek the help of the United States through its proxy the Shah's regime in Iran.⁵⁸⁵ The Ba'ath regime mindful of the foreign support for the Kurdish forces went ahead with the implementation of the autonomy law and opted to negotiate with 600 independent and anti-Barzani Kurds including Ahmed-Talabani faction.⁵⁸⁶ After the break down of negotiation between the Ba'athist government and the Kurds, open hostilities between the Iraqi army and the Kurdish forces resumed in earnest. The main reason for the breakdown of talks was that Barzani demanded a larger territorial area and a share of oil revenue proportionate to the Kurdish population.⁵⁸⁷ Barzani had overestimated the support of Iran and the United States, as McDowall notes on its part:

Iran had hoped the Kurdish war might even lead to the overthrow of the Ba'ath party, as it had done in 1963, but instead it found itself having to back the Kurdish forces overtly. Not only did it send Iranian Kurds to assist the *peshmerga*, but also deployed regular forces, dressed in Kurdish garb.⁵⁸⁸

⁵⁸² Chaliand has reported that 'according to a report of the Economic and Social Council of the United Nations, which held an inquiry in Kurdistan in October 1970, 300 villages were affected by the war, 40,000 houses were destroyed and 300, 000 people were left homeless.' Chaliand, 'Kurdish Tragedy', *op. cit.*, p. 61.

⁵⁸³ It is worth noting that running up to the impending armed conflict an unsuccessful assassination attempt against Barzani probably ordered by Saddam Hussein in 1971; Izady, 'the Kurds: a Concise Handbook', *op. cit.*, p. 68.

⁵⁸⁴ Aziz, 'the Kurds of Iraq', *op. cit.*, p. 73.

⁵⁸⁵ Chaliand, 'Kurdish Tragedy', *op. cit.*, p. 61; see also O.M. Smolansky & M.B. Smolansky, 'the USSR and Iraq: the Soviet Quest for Influence', Durham, N.C., 1991, pp. 117-27.

⁵⁸⁶ G.R. Stansfield, 'Iraqi Kurdistan: Political Development and Emergent Democracy', Routledge, 2010, p. 76.

⁵⁸⁷ Aziz, 'the Kurds of Iraq', *op. cit.*, p. 72; Ghareeb, 'the Kurdish Issue in Iraq: Its History, People and Politics', *op. cit.*, p. 73.

⁵⁸⁸ McDowall, 'a Modern history of Kurdistan', *op. cit.*, p. 338.

By April 1974, Barzani according to Zaid had diligently recruited and trained around 100,000 thousand *peshmergas* and another 50,000 irregulars.⁵⁸⁹ In the meantime, since the last armed conflict with the Kurds, the Iraqi army had also modernised and gradually built up their forces with the help of Soviet military advisors in anticipation of the impending conflict.⁵⁹⁰ By 1974, the Iraqi army had amassed 90,000 troops, 1200 tanks (including armoured personnel carriers) and crucially 200 fighter aircrafts in and around Iraqi Kurdistan.⁵⁹¹ In terms of intensity and casualty the armed conflict that ensued was very much reminiscent of a fully-fledged civil war and even at some stage more akin to an interstate armed conflict. The Kurdish forces based on military and material support from Iran and possibly Israel, inflicted heavy casualties upon the Iraqi army. They were completely at home in the mountains and had overwhelming support from their own rank and file. Indeed, this was a unique moment in the history of Kurdish people, in that the conflict attracted ‘the support of the vast majority of the Kurdish movement.’⁵⁹² The Iraqi armed forces, enjoying superior fire power, were also able to launch devastating air raids against civilian targets. Spurred on by their success against the Iraqi army in 1966 and 1969, Barzani organised his forces in a conventional army comprising of three divisions, and seventeen brigades of varying size.⁵⁹³

In the autumn of 1974, the well trained and disciplined Iraqi army began fighting and advanced deep into Kurdistan. The Iraqi government had built 700 miles of new roads in Kurdistan, mostly under proviso of goodwill to the Kurds but in reality this enabled Iraqi army to have access to previously inaccessible territories of the Kurdish territory.⁵⁹⁴ By the spring of 1975, the Iraqi army threatened to capture the whole of the Shuman valley, the main supply route running to the Iranian border. Although Iran had supplied the Kurds with light and medium guns, US anti-aircraft Hawk missiles and with heavy gun fire from inside of the

⁵⁸⁹ Barzani’s forces were three times stronger than ever before; H. Zaid, ‘the Role of KDP in the Kurdish Revolution’, Kurdistan 14, 1970 (*The Annual Journal of the Kurdish Students Society in Europe – KSSE*), pp. 7-10, cited in Stansfield, ‘Iraqi Kurdistan: Political Development and Emergent Democracy’, *op. cit.*, p. 76.

⁵⁹⁰ Pollack, ‘Arabs at war’, *op. cit.*, p. 156.

⁵⁹¹ The Use of air force according to Pollack was a telling factor in quelling the Kurdish challenge, Pollack, ‘Arabs at War, Military Effectiveness, 1948-1991’, *op. cit.*, p. 177.

⁵⁹² According to Sluglett *et al.* Barzani was supported even by ‘those who had long entertained doubts both on the score of the “feudal”, “reactionary” and “tribal” style of his leadership and on the periphery of his contacts with outside powers and forces whose disinterestedness, as well as good faith, was highly questionable.’ Sluglett, ‘Iraq since 1958: from Revolution to Dictatorship’, *op. cit.*, p. 168.

⁵⁹³ However, Stansfield points out that the entire military operation of Barzani forces were tightly controlled by the KDP through ‘a structure known as the Command Council headed by Barzani and comprising forty-six members who elected an Executive Bureau of nine members. The KDP was represented on each of these by members of the political Bureau and Central Committee.’ Stansfield, ‘Iraqi Kurdistan: Political Development and Emergent Democracy’, *op. cit.*, p. 77.

⁵⁹⁴ Pollack, ‘Arabs at war’, *op. cit.* p. 178.

Iranian border, by early 1975, it was clear that the Kurds had lost any hope of resisting the Iraqi offensive.⁵⁹⁵

2.9.4 The Algiers agreement of 1975

By February 1975, Iraq had indicated to some Arab states that it was ready to settle its dispute with Iran peacefully and was willing to settle its boundary dispute with Iran over the *Shat al-Arab* (*Arvand rood*) waterway.⁵⁹⁶ The Iraqi government offered Iran the recognition of the waterway between the two countries as an international waterway. The negotiation between the two states had secretly been taking place behind the scenes for many months unbeknown to the Kurds. On their part the Iranians had demanded recognition of the waterway as an international water as a price for their withdrawal of support for the Kurds. In reality, Iraq had made substantial territorial concessions to secure the withdrawal of Iran's support.⁵⁹⁷ In March 1975, the Iranian assistance to the Kurdish forces was suspended. On 6 March 1975, Iran and Iraq concluded the Treaty Concerning the State Frontier and Neighbourly Relations between Iran and Iraq (the Algiers Agreement);⁵⁹⁸ according to which Iran gave undertaking of not supporting the Kurdish insurgency in Iraq.⁵⁹⁹ Article 3 of the Algiers Agreement provides that:

The High Contracting Parties undertake to exercise strict and effective permanent control over the frontier in order to put an end to any infiltration of a subversive nature from any source, on the basis of and in accordance with the provisions of the Protocol concerning frontier security, and the annex thereto, attached to this treaty.

As a result of the withdrawal of Iranian assistance, the major armed conflict between the Iraqi army and the Kurdish *Peshmerga* in 1974 to 1975 ended in defeat for the Kurdish forces. Indeed, 'the Algiers Agreement was a bitter blow to the Kurdish dream of autonomy and destroyed Mullah Mustafa's ability to pursue the war.'⁶⁰⁰ The Ba'athist government gave Barzani and his *peshmerga* two weeks to put down their arms and even as a final insult to the Kurds Iran even threatened to assist in the military suppression of the resistance if it did

⁵⁹⁵ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 76-7.

⁵⁹⁶ Ibid, p. 77.

⁵⁹⁷ Aziz, 'the Kurds of Iraq', *op. cit.*, p. 74.

⁵⁹⁸ Treaty Concerning the State Frontier and Neighbourly Relations between Iran and Iraq, Baghdad, 13 June 1975, 1017 UNTS 54.

⁵⁹⁹ McDowall, 'a Modern history of Kurdistan', *op. cit.*, p. 337-38.

⁶⁰⁰ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 77.

continue.⁶⁰¹ Thus, the Kurdish struggle completely collapsed and on 23 March 1975, Barzani announced the end of the hostilities and went into exile in Iran with more than 100,000 of his *peshmerga* and their families joined another 100,000 Kurds already in Iran as refugees.⁶⁰² The Iraqi army embarked on a vicious campaign of reprisals not only against the *peshmerga* but also Kurdish civilians causing many thousands of deaths and destruction of an estimated 1,500 Kurdish villages.⁶⁰³ By 1978, in order to put an end to any notion of Kurdish revolt the Iraqi army created a *cordon sanitaire* thirty kilometres wide along the Kurdish and Iranian borders uprooting more than a thousand villages and forcibly deported more than half a million Kurds to Imara and Nasriye cities and suburbs in southern Iraq.⁶⁰⁴ This was yet another calamitous episode in the struggle of the Kurds for recognition and even limited self-determination. Suffering from cancer after arriving in Iran, to seek medical attention Barzani left for the United State. Barzani died in Washington in 1979 and was buried in the city of Oshnaviyeh in Iran.⁶⁰⁵ It was only after the collapse of the Kurdish movement in 1975 that Jalal Talebani formed a new party, the Patriotic Union of Kurdistan (PUK). PUK would assume a much more pivotal role in Kurdish political discourse not only in Iraq but in other Kurdish territories. Hence, the leadership of the Iraqi Kurds was divided between the two dominant Kurdish political parties KDP-Iraq led by Massoud Barzani and PUK led by Talebani. In the aftermath of the Kurdish defeat two distinct policies were implemented by the Ba'athist regime, 'the first was the ill-fated and prejudiced policy of Arabization of Kurdistan and the second was the policy of Ba'athization entire Iraqi society, including the Kurdish territory.'⁶⁰⁶

2.9.5 The emergence of the Patriotic Union of Kurdistan (PUK)

In the aftermath of the defeat of the KDP-Iraq in 1975, a more serious schism within the Kurdish movement in Iraq occurred. A group of radical KDP-Iraq members led by Jalal Talabani was to become the other major Kurdish group in the Iraqi Kurdistan. PUK was one the factions of the old KDP under Mullah Mustafa Barzani. It was established by the Kurds who had managed to escape to Damascus in June 1975.⁶⁰⁷ PUK mainly represented the

⁶⁰¹ Stansfield, 'Iraqi Kurdistan', *op. cit.*, p. 77-79.

⁶⁰² Aziz, 'the Kurds of Iraq', *op. cit.*, p. 74.

⁶⁰³ Yildiz, 'The Kurds in Iraq', *op. cit.*, p. 23.

⁶⁰⁴ Aziz, 'the Kurds of Iraq', *op. cit.*, p. 75.

⁶⁰⁵ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 77.

⁶⁰⁶ Aziz, 'the Kurds of Iraq', *op. cit.*, p. 74.

⁶⁰⁷ Gunter, 'Civil War in Kurdistan: the KDP-PUK Conflict', *op. cit.*, p. 228.

Kurdish urban intellectuals and adopted the same pragmatic slogan as the old KDP, namely, “autonomy for Kurdistan, democracy for Iraq” espoused Marxism as its political doctrine.⁶⁰⁸ In June 1976, Talabani formally announced the creation of the PUK from his refuge in Damascus.⁶⁰⁹ Chastened by the experience of Iran and the US, the PUK leadership described Barzani as “reactionary” and disagreed with the decision of the KDP, that continuing armed resistance against the Ba’athist regime would be futile.⁶¹⁰ Talabani accused Barzani of betraying the Kurdish nationalist aspirations by striking a bargain with the US, Israel and the Shah of Iran that eventually had caused its collapse.⁶¹¹ Ever since its existence, the PUK has forged a series of unlikely alliances with different powers and stakeholders in the region. Although from its inception it was supported financially and logistically by Syria but it has made alliances with KDP-I as a makeshift to the KDP supported by the Islamic regime in Iran since 1979. This resulted in many major armed conflicts between PUK and DKP ultimately weakening the Kurdish unity in Iraq. Even in 1983, at the height of Iran-Iraq War,⁶¹² it took on the Iranian forces under the pretext of “fighting the outside invaders” as a means of improving its relations with the Ba’athist regime in Baghdad.⁶¹³ In fact, by 1984, Talabani was openly negotiation with Saddam Hussein with the view of establishing an autonomous authority in northern Iraq under the control of PUK.⁶¹⁴ By 1985, the negotiations broke down owing to the refusal of the Iraqi government to make any concessions in relation to the financial autonomy of the oil-fields of Kirkuk and the local security forces.⁶¹⁵ Hence, the government of Iraq embarked on the resumption of its policy of Arabization and deportation of the Kurds in clear violation of international law and the ‘UN Guiding Principles’.⁶¹⁶ Owing to this development, the rapprochement between the KDP and PUK was inevitable and eventually in November 1986, they announced their intention to set aside their differences and signed an agreement in Tehran to cooperate against their common enemy the

⁶⁰⁸ ‘The PUK was an umbrella organization of three Iraqi Kurdish groups: Komala, a clandestine Marxist organization and the Socialist Movement of Kurdistan (KSM) and personal supporters of Talabani, M. Van Bruinessen, ‘the Kurds between Iran and Iraq’, *Middle East Report* (July-August 1986) 14-27, p. 24.

⁶⁰⁹ Entessar, ‘Kurdish Ethnonationalism’, *op. cit.*, p. 78.

⁶¹⁰ Aziz, ‘the Kurds of Iraq’, *op. cit.*, P. 74.

⁶¹¹ Entessar, ‘Kurdish Ethnonationalism’, *op. cit.*, p. 78.

⁶¹² During the 1980-88 war, Iran and Iraq reciprocally accused each other of inciting Kurdish opposition groups against each other. See 1980 *United Nations Yearbook* 312.

⁶¹³ Entessar, ‘Kurdish Ethnonationalism’, *op. cit.*, p. 78.

⁶¹⁴ McDowall, ‘a Modern History of the Kurds’, *op. cit.*, p. 349.

⁶¹⁵ Ibid.

⁶¹⁶ This practice was a clear violation of the International Convention on the Elimination of All Forms of Racial Discrimination. Entered into force, Jan. 4, 1969. 660 UNTS 195. In Human Rights, L. Henkin, *et al.*, Brill, 2001, pp. 180-91; Aziz, ‘the Kurds of Iraq’, *op. cit.*, P. 77; Chaliand, ‘Kurdish Tragedy’, *op. cit.*, p. 70.

Ba'athist regime in Iraq.⁶¹⁷ This was indeed a big victory for the Islamic regime in Tehran to secure the support of the two major Kurdish groups in Iraq.⁶¹⁸ Buoyed by the explicit Iranian support the Kurdish groups established a *de facto* division of the Kurdish region according to their party lines. Yet again, this was another example of the Kurds being reduced to mere pawns in the power politics of the region.⁶¹⁹

2.9.6 The Anfal campaign: the genocide of the Kurds

In order to reassert its authority in the region the Iraqi Government mindful of the alliance between the Iraqi Kurds (the PUK and KDP) and their collaboration with Iran at the height of the Iran-Iraq War embarked on a military operation code-named *al-Anfal*.⁶²⁰ This phrase was used to refer to the series of eight military offensives conducted from February to August 1988 against the Kurds. What was to follow constitutes one of the most shameful chapters of not only the Kurdish history but human affairs.⁶²¹ On 29 March 1987, Saddam Hussein issued Decree No. 160 of the Revolutionary Command Council according to which he appointed his cousin Ali-Hassan al-Majid, later widely referred to as “Chemical Ali,” as the head of the Iraqi State Services and the chief of the *Ba'ath* Party's Bureau for Northern Affairs. This military operation was distinct from others mounted by the Iraqi army against the Kurds. The cause of this military operation's international notoriety was the systematic use of chemical weapons against the military and civilian targets.⁶²² By virtue of this campaign Iraq became the first sovereign state to attack its own population with chemical weapons. It is worth noting that prior to the deployment of chemical weapons against its Kurdish population Iraq

⁶¹⁷ McDowall, ‘a Modern History of the Kurds’, *op. cit.*, p. 351.

⁶¹⁸ Entessar, ‘Kurdish Ethnonationalism’, *op. cit.*, p. 79.

⁶¹⁹ For Iran for instance the use of NSAG in other states in the region has been a cornerstone of its foreign policy since inception in 1979. Generally see Petty, ‘Veiled Impunity: Iran's Use of Non-State Armed Groups’, *op. cit.*

⁶²⁰ The term ‘Anfal’ has its origin in one of the *sura*, or verses, of the Koran, which refers to the ‘spoils of [holy] war; see <www.road-to-heaven.com/quran/english/8.htm>.

⁶²¹ M.A. Newton, ‘the Anfal Genocide: Personal Reflections and Legal Residue’, 40 *Vanderbilt Journal of Transatlantic Law* 1523 2007, p. 1525; in the opinion of the US Senator Claiborne Pell, Chairman of the Committee of Foreign Relations: “had the Gulf War not intervened, it is likely that Iraq's Kurdish population would have been exterminated.” see *Mass killings in Iraq: hearing before the Committee on Foreign Relations, United States Senate, One Hundred Second Congress, second session, March 19, 1992.*”

⁶²² The following excerpt from Human Rights Watch report is unequivocal on the Iraq's use of chemical weapons against the Kurds: ‘Most notable perhaps among our findings is the unequivocal evidence we have been able to accumulate of Iraq's repeated use of chemical weapons against the Kurds. To summarise the evidence: we gave found several documents that report on specific air and artillery attacks carried out by Iraqi forces with chemical agents against Kurdish villages in 1987 and 1988. These documents match in precise detail testimonial and forensic evidence collected by Middle East Watch in northern Iraq in 1992. The documents are crystal clear, for example, on the issue of culpability for the chemical attack on Halabja on March 16, 1988, in which 5,000 Kurdish civilians were killed’, Middle East Watch, *Bureaucracy of Repression: the Iraqi Government in its own Words*, 1994, p. 10.

had used it extensively against the Iranian forces in the course of Iran-Iraq War.⁶²³ The targeted region was home to thousands of farming communities, and was where the Kurdish resistance to Saddam's dictatorship was most active.⁶²⁴ The Anfal Campaign resulted in destruction of 3,000 villages, death of an estimated 180,000 and displacement of 1.5 million Kurdish population of Iraq.⁶²⁵ Anfal is cited as one of the most brutal acts of genocide with profound demographic, economic, psychological impact upon the Iraqi Kurds.⁶²⁶ Initially, the campaign was limited to destruction of mainly rebel villages, capture and execution of a large number of the Kurdish fighters and intermittent use of chemical weapons.⁶²⁷ In June 1987, al-Majid issued successive sets of standing orders to govern the conduct of the security forces through the Anfal campaign and beyond.⁶²⁸ The crux of these orders was based on the simple maxim that in the "prohibited" rural areas, all resident Kurds were to be considered as collaborators of the Kurdish fighters and should be dealt with accordingly through a policy of "shoot-to-kill".⁶²⁹ In Clause 4 of one of the Directives numbered SF/4008, dated 20 June 1987, he modifies and expands on these orders by a bald incitement to mass murder by ordering army commanders 'to carry out random bombardments, using artillery, helicopters and aircrafts, at all times of the day or night, in in order to kill the largest number of persons present in these prohibited zones.'⁶³⁰ In Clause 5 of the same Directive, he demands that, 'all persons captured in those villages shall be detained and interrogated by the security services and those between the ages of 15 and 70 shall be executed after any useful information has been obtained from them, of which we should be duly notified.'⁶³¹ By the end of February 1988, the PUK leader Jalal Talabani accused the Iraqi forces of committing genocide against the Kurdish population, with 1.5 million already deported, and 12 cities and 3000 villages

⁶²³ See generally T. McCormack, 'International law and the Use of Chemical Weapons in Gulf War', *California western International Law Journal*, Vol. 21, 1990-91, p. 29; also F. Kalshoven, 'Prohibition or Restriction on the Use of Methods and Means of Warfare', the Gulf War of 1980-1988: the Iran-Iraq War in International Legal Perspective', 1992, p. 101.

⁶²⁴ C. Hardi, 'the Anfal Campaign against the Kurds: Chemical Weapons in the Service of Mass Murder', in R. Lemarchand (ed.), 'Forgotten Genocides: Oblivion, Denial and Memory', Pennsylvania U.P., 2011, 106-122, p. 107.

⁶²⁵ A Middle East Watch Report, Genocide in Iraq: the Anfal Campaign against the Kurds (Human Rights Watch, 1993) Appendix B, 'the Perpetrators of Anfal: a Road-Map to the Principal Agencies and Individuals' <www.hrw.org/reports/1993/iraqanfal/APPENDIXB.htm>.

⁶²⁶ S. Laizer, 'Martyrs, Traitors and Patriots: Kurdistan after the Gulf War', Zed Books, 1996, p. 27.

⁶²⁷ Gray & Olleson, 'The Limits of the Law on the Use of Force', *op. cit.*, p. 369.

⁶²⁸ Joost Hiltermann, 'Bureaucracy of Repression: the Iraqi Government in its Own Words', Human Rights Watch <<http://www.hrw.org/reports/1994/iraq/>>.

⁶²⁹ "Chemical Ali" in his own words, an abbreviated version: Human Rights Watch transcripts of audio tapes, July 1993 <<http://www.hrw.org/legacy/campaigns/iraq/chemicalali.htm>>.

⁶³⁰ The Directive cited in M.J. Kelly, 'the Tricky Nature of Proving Genocide against Saddam Hussein before the Iraqi Special Tribunal', 38 *Cornell ILJ* 983 (2005), p. 991.

⁶³¹ Ibid.

laid waste in the Kurdish territory.⁶³² Human Rights Watch estimates that between 70,000 to 150,000 ‘disappeared’ during the campaign.⁶³³

Throughout the Anfal Campaign the Iraqi army deployed a variety of chemical weapons,⁶³⁴ including mustard gas, a blistering agent and Sarin, a nerve agent known as GB.⁶³⁵ On 16 March 1988, the Iraqi forces bombardment of the town of Halabja is the largest known use of chemical weapon against civilians. It is estimated that at least 5,000 died immediately, mainly women and children and more than 12,000 were injured.⁶³⁶ Halabja was the worst single violation of the 1925 Geneva Protocol on the Use of Chemical Weapons since the invasion of Abyssinia by Italy under Mussolini’s rule in 1933.⁶³⁷ The full details of atrocities committed in the Anfal Campaign took some time to reach the rest of the world.⁶³⁸ The US Secretary of State George Shultz was scathing in his condemnation of the Iraqi Government and described Iraq’s use of chemical weapons against its Kurdish population “unjustified and abhorrent” and unacceptable to the civilized world.⁶³⁹ One should note that in 1988, Iraq enjoyed near-impunity on the international stage because of its war with the universally despised Islamic regime in Iran, not to mention the importance strategic and economic interests of the Western and Eastern Bloc in Iraq.⁶⁴⁰

2.9.7 The Gulf War 1990-91: the establishment of a safe haven

In August 1990 Iraq invaded Kuwait, and was subsequently driven out by the international community authorized by the Security Council in 1991.⁶⁴¹ The Kurdish leaders in Iraq

⁶³² US State Department, Iraq: Country Report on Human Rights Practices, 25 February 2004 <<http://www.state.gov/j/drl/rls/hrrpt/2003/27928.htm>>.

⁶³³ US State Department, ‘Iraq’ 7 April 2011 <<http://www.state.gov/documents/organization/160462.pdf>>.

⁶³⁴ See Report of a Medical Mission to Turkish Kurdistan by Physicians for Human Rights, Wind of Death: Iraq’s Use of Poison Gas against its Kurdish population, 1989 <www.phrusa.org/research/iraq/winds.html>.

⁶³⁵ Yildiz, ‘Kurds in Iraq’, *op. cit.*, p. 26. See the Prosecutorial closing arguments of Chief Public Prosecutor, Judge Mungadh al-Far’un, in Anfal case, at 5-7, <<http://www.iraq-ihf.org/en/doc/ppb.pdf>>. Also see M.A. Newton, ‘Inside Look at the Anfal Trial’, *Nashville B.J.*, Sept. 2006, at 8-9, 17-18.

⁶³⁶ See the *Anfal* Trial before the Iraqi High Tribunal (formerly the Iraqi Special Tribunal), tried Ali Hassan al-Majid and two defendants, Sultan Hashem Ahmad and Hussein Rashid Mohamad, were convicted of genocide and related charges and sentenced to death. See BBC, 24 June 2007, Timeline: ‘Anfal Trial’ <http://news.bbc.co.uk/2/hi/middle_east/5272224.stm>.

⁶³⁷ McDowall, ‘a Modern History of the Kurds’, *op. cit.*, p. 361; for the text of the Protocol see *League of Nations Series*, Vol. 94, pp. 66-74.

⁶³⁸ For the report of the atrocities reflected in western media see, e.g. the *Daily Telegraph*, 24 April 1987, the *Guardian* 2 May 1987, *International Herald Tribune*, 12 May 1987.

⁶³⁹ ‘Shultz accuses Iraq of use of poison gas’, *The Telegraph*, 9 September 1988, p. 25; Yildiz, ‘Kurds in Iraq’, *op. cit.*, p. 31.

⁶⁴⁰ S. Totten, W.S. Parsons (ed.), ‘Century of Genocide: Critical Essays and Eyewitness Accounts’, Routledge, 3rd ed., p. 393.

⁶⁴¹ In response to the invasion Security Council adopted Resolution 660 which determined that there was a breach of international peace and security which acting under Articles 39 and 40 of the Charter demanded

sensing an apparent weakness within the Iraqi government seized the opportunity to take up arms against the central government. The revolt culminated in the capture of the city of Kirkuk on 19 March 1991 and most of the towns in the Kurdish populated northern Iraq.⁶⁴² In the aftermath of Iraq accepting the terms of the cease-fire under the Security Council Resolutions 686 (1991) and 687 (1991), the Iraqi government once again turned its forces towards the Kurdish revolt with devastating consequences. It launched a massive counter-attack against the Kurdish forces of KDP and PUK to reassert its authority on the Kurdish region. By the end of March 1991, the Iraqi forces had managed to recapture a big part of the territory previously under the Kurdish control and inflicting heavy casualties on the Kurdish NSAGs. This also led to a massive movement of Kurdish refugees towards the Iranian and Turkish borders in search of a safe haven from the Iraqi troops.⁶⁴³ In its communication to the UN, the Iraqi government highlighted Iran as the instigator for infiltrating the armed bands and subversion of the Kurds; it proclaimed: ‘treacherous foreign enemy forces behind the rebelling Kurds using “slogans of national schism”’.⁶⁴⁴ Nevertheless, once the Iraqi government had re-established its authority over the Kurdish region, the ruling Revolutionary Council adopted a reconciliatory approach towards the Kurds by referring to ‘Kurdish and Arab citizens’ and ‘Kurdish Iraqi citizens’, and granting amnesty to anyone who had taken part in the Kurdish revolt.⁶⁴⁵ Such protestation by the Iraqi government did not hide the fact that at the time there was a humanitarian catastrophe taking place in northern Iraq.⁶⁴⁶ This prompted France and Turkey to call for a meeting of the UN Security Council citing the plight of the Kurds in Iraq as a threat to international peace and security.⁶⁴⁷ France in particular was unequivocal in the need for a meeting ‘to discuss the serious situation resulting from abuses being committed against the Iraqi population in several parts of Iraq and more

immediate and unconditional withdrawal of the Iraqi forces to their position of 1 August 1990. Text in (1990) *ILM*, 1325. Generally see C. Warbrick, ‘the Invasion of Kuwait by Iraq’, *ICLQ* 40(2) (1991): 482-492.

⁶⁴² This also coincided with the revolt of the *Shi’a* population encouraged by mass desertion from the army in the south of the country which was ended by the Government’s elite Presidential Guards prior to engagement with the Kurds in the north. McDowall, ‘a Modern History of the Kurds’, *op. cit.*, p. 371.

⁶⁴³ 1991 United Nations Yearbook 204.

⁶⁴⁴ UN Doc S/22452, annex ‘Statement issued by the Revolution Council of Iraq, also UN Doc S/22364; UN Doc S/22371; UN Doc S/22401.

⁶⁴⁵ Letter Dated 5 April 1991 from the Permanent Representative of Iraq to the United States Addressed to the Secretary-General, UN Doc S/22451.

⁶⁴⁶ P. Malanczuk, ‘the Kurdish Crisis and Allied Intervention’, 2 *EJIL* (1991) 114, pp. 118-19.

⁶⁴⁷ Letter Dated 2 April 1991 from the Permanent Representative of Turkey to the United States Addressed to the Secretary-General, UN Doc S/22435; Letter Dated 4 April 1991 from the *Charge D’Affaires* A.I. of the Permanent Mission of France to the United States Addressed to the Secretary-General, UN Doc S/22442; see also Iran’s communication to the Security Council expressing concern in relation to the influx of Kurdish refugees into its border, UN Doc S/22447. Iran also made a communication to the UN highlighting the desperate situation of the Kurds amassed on its border with Iraq, UN Doc S/22447; Malanczuk, ‘the Kurdish Crisis and Allied Intervention’, *op. cit.*, pp. 118-19.

particularly in Kurdish inhabited areas; by virtue of its repressions in the region this situation continues a threat to international peace and security.⁶⁴⁸ It is worth noting that in its communication to the UN, Turkey did not specifically mention the Kurds and opted to refer to the plight of 220,000 Iraqi citizens mostly women, elderly and children that had amassed along its southern border mainly because of operations carried out by the Iraqi Armed forces.⁶⁴⁹ In its communication of 4 April 1991, to the UN, Turkey stated:

It is apparent that the Iraqi government forces were deliberately pressing these people towards the Turkish border in order to drive them out of their own country. These actions violate all norms of behaviour towards civilian populations and constitute an excessive use of force and a threat to the region's peace and security. In the course of the Iraqi operations, which were being carried out with the support of helicopters and artillery, many mortar shells actually landed on Turkish Territory.⁶⁵⁰

In reality, Iran allowed over a million Kurdish refugees into its territory but Turkey refused to honour its asylum obligations under international law leaving some 400,000 refugees stranded on its border with no possessions or supplies.⁶⁵¹ Due to the desperate predicament of the Kurds, the international community was left with no alternative but to intervene in the situation by adopting Security Council Resolution 688 on 5 April 1991.⁶⁵² The Resolution called upon Iraq to end repression of its civilian population and to allow immediate access by international organizations to all those in need of assistance.⁶⁵³ Contrary to the popular belief the aforementioned Resolution was not based on Chapter VII of the UN Charter and specifically refers to Article 2(7) of the UN Charter which prohibits interference in matters essentially within the domestic jurisdiction of a sovereign state.⁶⁵⁴ Iraq on its part was very indignant on adoption of Resolution 688 and stated that this was yet 'another tendentious and biased Resolution against Iraq.'⁶⁵⁵ It stated that:

⁶⁴⁸ UN Doc S/22442.

⁶⁴⁹ McDowall, 'a Modern History of the Kurds', *op. cit.*, pp. 372-3.

⁶⁵⁰ UN Doc S/22435.

⁶⁵¹ T.B. Seybolt, 'Humanitarian Intervention: the Conditions for Success and Failure', Oxford U.P., 2007, p. 48.

⁶⁵² F. R. Teson, 'Collective Humanitarian Intervention', *Mich JIL*, Vol. 17, 1995-96, p. 344.

⁶⁵³ The importance of Resolution 688 was two-fold; on the one hand it was the first time (since the League of Nations Arbitrations of the Mosul *vilayet* in 1925/26) to mention the Kurds by name, thus lifting their status internationally. Secondly, it was for the very first time that the UN had insisted on the right of interference in the internal affairs of a member state. see McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 375; also Allain, 'International Law in the Middle East', *op. cit.*, pp. 40-1.

⁶⁵⁴ C. Gray & S. Olleson, 'The Limits of the Law on the Use of Force: Turkey, Iraq and the Kurds', *Finch Yearbook of International Law* 354 (Vol. XII, 2001), p. 371.

⁶⁵⁵ Identical Letters dated 8 April 1991 from the Permanent Representative of Iraq to the United Nations Addressed Respectively to the Secretary-General and the President of the Security Council, UN Doc S/22460.

It is extremely paradoxical that the Council should show in letters from Iran and Turkey concerning the situation of the Kurds despite the fact that the world knows full well that these states do not by any means recognize any of the rights of the Kurds (such as distinct nationality) in their countries, where the majority of the Kurds are to be found.⁶⁵⁶

In the same letter to the UN Secretary General, Iraq expressed the view that it was highly paradoxical that states such as Iran, Syria and the United States had incited agents and subversives against the authority in Iraq and provided the Kurdish forces with weapons and materiel to undermine the restoration of security in the country.⁶⁵⁷

Although Resolution 688 did not authorize the use of force, the US and UK undertook military operations in northern Iraq in order to protect the Kurdish refugees and more importantly forced the Iraqi army out of the region to allow international humanitarian organizations to operate there.⁶⁵⁸ The flight of the Kurds from northern Iraq was not the worst humanitarian crisis of its kind but perhaps the most dramatic.⁶⁵⁹ The crisis unravelled in a matter of days perhaps for the first time in the history of humanitarian intervention, the whole story was being captured by television cameras across the globe in all its squalor.⁶⁶⁰ This was followed by the US, UK and France declaring a no-fly zone above the 36th parallel in northern Iraq to protect the Kurdish population of Iraq from any further attacks from the Iraqi armed forces.⁶⁶¹ The Security Council was never called upon to consider the legality of the no-fly zone over northern Iraq.⁶⁶² It is worth adding that Turkey allowed the use of the *Incirlik* airbase for the US and UK aircrafts policing the no-fly zone in northern Iraq first in *Operation Provide Comfort*,⁶⁶³ later in *Operation Poised Hammer*, starting from July 1991, and subsequently from December 1996 in *Operation Northern Watch* until the invasion of

⁶⁵⁶ Ibid.

⁶⁵⁷ Ibid.

⁶⁵⁸ See Karl-August Fleischhauer, at the time the legal advisor to the UN, cited in T.M. Franck, 'Fairness in International Law and Institutions', Oxford U.P. 1995, p. 236; see also R.G. Allen, et al., 'Refining War, Civil Wars and Humanitarian Controls' (1996) 18 *Hum. Rts. Q.* 747, p. 763.

⁶⁵⁹ Seybolt, 'Humanitarian Intervention', *op. cit.*, p. 47.

⁶⁶⁰ *Keesing's Record of World Events* (1991) 38126.

⁶⁶¹ See the opinion expressed by a British Foreign Office legal advisor to the house of Commons Foreign Affairs Committee, UKMIL, 63 BYIL, 1992, pp. 827-8; see also C. Gray, 'International Law and the Use of Force', 3rd ed., Oxford U.P., 2008, p. 37-8.

⁶⁶² T. McIlmail, 'No-Fly Zones: the Imposition and Enforcement of Air Exclusion Regimes over Bosnia and Iraq', *Loyola of Los Angeles International and Comparative Law Journal*, Vol. 17, 1994, p. 48.

⁶⁶³ The emergency phase of the operation was highly successful in assisting displaced Kurds along the Iraq-Turkey border saving many lives in the process. In contrast, 1 million Kurds who received no international help sought refuge inside the Iranian territory provided for by the Iranian Red Crescent Society, the local population and UNHCR, which flew in supplies, but not in sufficient quantity. See E. Hoskins, 'Public Health and the Persian Gulf War', in B.S. Levy & V.W. Sidel, 'War and Public Health', Oxford U.P., 1997, p. 257.

Iraq by the US-led Allied forces in 2003.⁶⁶⁴ The US for its part claimed that there is authorization under Resolutions 678 and 688 put together, and northern Iraq is ‘under the supervision of the United Nations’ or ‘under the protection of the United Nations.’⁶⁶⁵ The US and UK have repeatedly stated that they do respect the territorial integrity of Iraq and do not support the establishment of an independent Kurdish state in northern Iraq.⁶⁶⁶ Since the establishment of the no-fly zone in northern Iraq the US and UK had repeatedly been involved in clashes over the issue with the Ba’athist regime in Baghdad. In the aftermath of *Operation Desert Fox* in 1998 these clashes escalated substantially by the Allies mainly targeting Iraqi air defence systems.⁶⁶⁷

From humanitarian point of view *Operation Provide Comfort* was a resounding success, by the Summer of 1992 most of the Kurdish refugees had returned home, where they began to put their lives back together under the protection of the no-fly-zone.⁶⁶⁸ The declaration of the no-fly zone over northern Iraq by the Western powers described by some scholars as illegal has meant that a *de facto* Kurdish entity has been able to mature under the auspices of the Western powers with considerable political and legal implications.⁶⁶⁹ It has been noted that ‘the intervention thus provided not merely emergency humanitarian aid, but long-term military assistance that shifted the balance of power within Iraq, effectively rewarding the Kurds with political autonomy that also promoted their human rights.’⁶⁷⁰ Consequently, the Kurds in northern Iraq have been able to exercise considerable authority over that territory leading to the formation of Kurdistan Regional Government (KRG).⁶⁷¹ In spite of the protection provided by the Western Allies, Iraqi Kurds remained divided along geographical and political divisions.⁶⁷² This *de facto* division of the liberated province has been cited as a

⁶⁶⁴ Gray & Olleson, ‘The Limits of the Law on the Use of Force’, *op. cit.*, p. 372.

⁶⁶⁵ Gray & Olleson, ‘The Limits of the Law on the Use of Force’, *op. cit.*, p. 373

⁶⁶⁶ See United Kingdom Materials on International Law’ 1999, 70 *British Year Book of International Law* (1999) 421; see also e.g. Press statement by the British and Commonwealth office of 14 May 1997; Dos, Daily Press Briefing, 12 January 1995; 10 April 1995; 4 September 1996 (archives of the Daily Press Briefing <www.dosfan.lib.uic.edu>).

⁶⁶⁷ See C.D. Gray, ‘from Unity to Polarization: International Law and the Use of Force against Iraq’, 13 *EJIL* (2002) 1, p. 9.

⁶⁶⁸ C. Hitchens, ‘the Struggle of the Kurds’, *National Geographic Magazine*, August 1992, pp. 32-60.

⁶⁶⁹ Remarks of international legal scholars at the 1991 American Association of International Law annual meeting illustrate that the resolutions are not seen as strong authority for the no-fly zone, McIlmail, ‘No-Fly Zones’, *op. cit.*, p. 58; see also J. Lobel & M. Ratner, ‘Bypassing the Security Council: Ambiguous Authorization to Use Force, Cease-fires and the Iraqi Inspection Regime’, 93 *AJIL* (1999) 124; F. Cuny, ‘Northern Iraq: One Year Later (Carnegie Endowment, Washington, DC, 1992), p. 15.

⁶⁷⁰ A.J. Kuperman, ‘Humanitarian Intervention’, in M. Goodhart (ed.), ‘Human Rights: Politics & Practice’, Oxford U.P., 2009, p. 338.

⁶⁷¹ See M. Gunter, ‘a *de facto* Kurdish State in Northern Iraq’, *Third World Quarterly*, Vol. 14, 1993, pp. 295-319.

⁶⁷² B. O’Leary et al., ‘the Future of Kurdistan in Iraq’, Pennsylvania U.P., 2005, p. 214.

major obstacle to any Kurdish claim to autonomy or independence.⁶⁷³ This division manifested itself in the elections held in May 1992 (the first of its kind in northern Iraq) in which the KDP supported by the US and UK having overwhelming support in Dohuk in the north and the PUK mainly supported by Syria and Iran dominated provinces of Kirkuk and Sulaymaniya in the south.⁶⁷⁴ By the mid-nineties the KDP and PUK had also evolved into fully-fledged political parties.⁶⁷⁵ Throughout the nineties there were many armed clashes between the two major Kurdish armed groups in northern Iraq.⁶⁷⁶ The intensity of some of these internal clashes at times was very fierce and in one occasion in Summer of 1996, when the Iranian armed forces with the cooperation of PUK entered KDP controlled territory in search of armed members of an opposition group the People's Mujahedeen Organization of Iran (PMOI),⁶⁷⁷ KDP asked for assistance from the Ba'athist regime.⁶⁷⁸ This was the first combat operation carried out by the Iraqi armed forces since the establishment of the no-fly-zone resulting in the capture of the important city of Erbil, the administrative centre of the KRG.⁶⁷⁹ This left the US with no alternative but to intervene to eject the Iraqi forces from the north by targeting Iraqi forces in the north and the Iraqi air defence system in the south of the country.⁶⁸⁰

Continuation of the conflict between PUK and KDP eventually led to the intervention by the US, UK and Turkey to sponsor talks between the two Kurdish groups (the Ankara Process), leading to a cease-fire and the Ankara Accord of October 1996.⁶⁸¹ However, the clashes between the two Kurdish groups continued unabated resulting in many hundreds of deaths in

⁶⁷³ Because of this division between the Kurds eventually gave the Ba'athist regime a pretext to intervene briefly in the northern province with grave consequences for the Kurdish population and the subsequent intervention of the US and UK in ejection of the Iraqi forces from the territory once again. See generally Tripp, 'History of Iraq', *op. cit.*, pp. 271-5.

⁶⁷⁴ McDowall notes that: 'The dead heat between the KDP-Iraq and PUK merely underlined the manifold and overlapping antagonism between the two parties; personal between the two leaders, geographical between Bahdinan and Suran, linguistic between Kurmanji and Surani, and ideological between "traditionalist" and "progressive" cultures.' McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 385.

⁶⁷⁵ As noted earlier most of Kurdish non-state actors after 1945 had developed a dual policy of armed struggle through their armed wings (NSAGs) as well as developing a political narrative at the same time. For the first time the Kurds could fully engage in their own political discourse under the shadow of their guns.

⁶⁷⁶ Generally see M.M. Gunter, 'Civil War in Kurdistan: KDP and PUK conflict', *Middle East Journal*, 50:2 (1996:Spring), p. 225.

⁶⁷⁷ UN Doc S/1996/602 for reliance on Article 51 of the UN Charter for its action; see Gray & Olleson, 'The Limits of the Law on the Use of Force', *op. cit.*, p. 376.

⁶⁷⁸ Romano, 'the Kurdish Nationalist Movement', *op. cit.*, p. 210.

⁶⁷⁹ *Keesing's Record of World Events* (1996) 41246.

⁶⁸⁰ For Iraq's protest to the UN see UN Doc S/1997/393; for the US rationale for the action see UN Doc S/1996/711.

⁶⁸¹ *Keesing's Record of World Events* (1996) 41296-7; See also 'Letter from the US President Bill Clinton to the Speaker of the House of Representatives and the President *pro tempore* of the Senate', 23 September 1997 <clinton6.nara.gov>; Gray & Olleson, 'The Limits of the Law on the Use of Force', *op. cit.*, p. 376.

the process.⁶⁸² The division between the two major Kurdish groups was eventually settled in September 1998 through the Washington Accord (affirmed in 1999) under pressure from the US.⁶⁸³ Turkey mindful of problems with its own Kurdish population maintained a rather sceptical attitude towards this process.⁶⁸⁴ This scepticism became a major concern when it was announced that as part of the agreement there was going to be a Kurdish Regional Parliament.⁶⁸⁵ The major by-product of the establishment of the no-fly zone in northern Iraq has been the creation of a safe haven for other Kurdish NSAGs namely PKK operating in Turkey and the Party for a Free Life of Kurdistan (PJAK) operating in Iran in recent years.⁶⁸⁶ Ever since the establishment of the KRG, due to the apparent inability of the authorities there, Turkey has carried out incursions and air strikes on PKK bases mainly in the *Qandil* Mountain area in northern Iraq to stop PKK attacks.⁶⁸⁷

2.10 The Kurds in Turkey: the Post-1946 Era

2.10.1 Repression of the Kurdish population in 1950s & 1960s

In the intervening years between the World Wars, international law was in its embryonic stage of development and could not provide the Kurds with any protection as a distinct cultural group particularly in Turkey, where they received the harshest treatment by the Kemalist autocratic regime.⁶⁸⁸ It is important to point out that after the bloody revolts in the aftermath of the creation of the modern Turkish Republic in 1923, a policy of systematic state repression was imposed on the Kurdish populated provinces within Turkey. In fact, ‘after the fall of Dersim, there were no more major armed uprisings in Kurdistan ... the massacres, the massive deportations, the militarization and systematic surveillance of the Kurdish territories had all had an undeniably intimidating effect on the population. Revolt ceased to be a

⁶⁸² For a background to KDP-PUK clashes see M. Gunter, ‘Civil War in Kurdistan: the KDP-PUK Conflict’, *Middle East Journal*, 50:2 (1996: Spring) 225- 241, p. 229.

⁶⁸³ Gray & Olleson, ‘The Limits of the Law on the Use of Force’, *op. cit.*, p. 376.

⁶⁸⁴ *Keesing’s Record of World Events* (1996) 42574.

⁶⁸⁵ *Keesing’s Record of World Events* (1998) 42526, 42574.

⁶⁸⁶ Omer Taspinar, ‘Turkey’s Middle East Policies: between Neo-Ottomanism and Kemalism’, *Carnegie Papers*, No 10, September 2008, 23 <http://www.carnegieendowment.org/files/cmec10_taspinar_final.pdf>.

⁶⁸⁷ This is in light of the fact that, the creation of a safe haven in northern Iraq has enabled the PKK to operate with increasing impunity. Kemal Kirişci, ‘Turkey and the Kurdish Safe-Haven in Northern Iraq’, *Journal of South Asian and Middle Eastern Studies*, Vol. XIX, No. 3, Spring 1996, 21-39, p. 29; see also Stephen Farrell *et al.*, ‘with the PKK in Iraq’s *Qandil* Mountains’, 5 January 2011, *the New York Times* <<http://atwar.blogs.nytimes.com/2011/01/05/with-the-p-k-k-in-iraqs-qandil-mountains/>>.

⁶⁸⁸ Yildiz & Muller, ‘The EU and Turkish accession’, *op. cit.*, p. 10.

credible avenue towards liberation.⁶⁸⁹ A report published by the CIA stated that from 1937 onwards Turkey pursued:

‘A program of assimilation – likely to be continued’ and that ‘the Turkish Government has kept a strict watch over the Kurdish areas and, while doing so, has worked assiduously to assimilate the Kurds ... Turkish policy is based on the concept that “there is no Kurdish problem, and there are no Kurds.”’⁶⁹⁰

It was during this period that the dominant concept of state superiority over its citizens, upon which the Kemalist state was built, further buried the distinctive ethnicity of the Kurds through the policy of “Turkification”.⁶⁹¹ Consequently, the Kurdish community in Turkey became the primary victims of state repression, its restrictive legislations and state violence.⁶⁹² Further, since the major revolts of 1920s and 1930s, the state imposed Martial Law throughout the Kurdish region and deployed more than 52,000 military personnel there.⁶⁹³ The region of south-eastern Turkey remained a militarized zone until 1966.⁶⁹⁴ In the aftermath of the aforementioned rebellions the state presided over destruction of many Kurdish villages and mass deportation of thousands of Kurds to the west of the country.⁶⁹⁵ This has resulted in tangible Kurdish populations in some of the major cities in the western part of Turkey such as Istanbul, Ankara and Izmir.⁶⁹⁶

Following the implementation of multi-party democracy in 1945, the incumbent Kemalist government was subsequently replaced by the Democratic Party in 1950.⁶⁹⁷ However, it was only in the early 1960s that there was a resurgence of Kurdish identity. This was in spite of the fact that the Kurdish population of Turkey by this time had been more or less integrated into the Turkish society.⁶⁹⁸ This manifested itself through the emergence of democratic and

⁶⁸⁹ Kendal, ‘Kurdistan in Turkey’, *op. cit.*, p. 62.

⁶⁹⁰ CIA Report, ‘the Kurdish Minority Problem’, Copy No. 41 (8/12/1948) <http://www.foia.cia.gov/docs/DOC_0000258376/DOC_0000258376.pdf>.

⁶⁹¹ See M. Yavuz, ‘Search for a New Social Contract in Turkey: Fetullah Gülen, the Virtue Party and the Kurds’, *SAIS Review*, Johns Hopkins U.P., 19(1) (1999): p. 124.

⁶⁹² It has been stated by some that since the advent of the Turkish Republic until the early fifties, Kurdistan was held down by terror. Kendal, ‘Kurdistan in Turkey’, *op. cit.*, pp. 72-79.

⁶⁹³ McDowall, ‘a Modern History of the Kurds’, *op. cit.*, pp. 16-17.

⁶⁹⁴ M.M. Gunter, ‘the Kurds and Future of Turkey’, St. Martin’s Press, 1997, p. 6; Chaliand, *a People Without a Country*, *op. cit.*, p. 250.

⁶⁹⁵ J. Jongerden, ‘the Settlement Issue in Turkey and the Kurds: an Analysis of Spatial Policies, Modernity and War’, Brill, 2007, p. 14-15.

⁶⁹⁶ Fuller describes Istanbul as the biggest Kurdish city in the world. G.E. Fuller, ‘the New Turkish Republic: Turkey as a Pivotal State in the Muslim World’, US Institute of Peace Press, 2008, 89; S. Mutlu, ‘Ethnic Kurds in Turkey: a Demographic Study’, *International Journal of Middle East Studies*, (1996), Vol. 28, pp. 517-541.

⁶⁹⁷ J.M. Vanderlippe, ‘the Politics of Turkish Democracy: Ismet Inonu and the Formation of the Multi-Party System, 1938-50’, New York State U.P., 2005, p. 202.

⁶⁹⁸ Emrullah Uslu, ‘the Transformation of Kurdish Political Identity in Turkey: Impact of Modernization, Democratization and Globalization’, Pro-Quest Publishing, 2011, p. 110.

leftist movements that assisted the burgeoning of Kurdish nationalism.⁶⁹⁹ The Kurds voted in large numbers for the Democratic Party as a reaction to the oppressive measures imposed on the Kurds by the Kemalist regime and even a number of Kurds were elected to the Turkish National Assembly (TNA) and even some were appointed as ministers.⁷⁰⁰ The new political environment was short lived and in 27 May 1960 the first military coup d'état removed Adnan Menderes, the democratically elected Prime Minister who was subsequently executed leading to a period of chaos and repression especially directed at the Kurds.⁷⁰¹ The use of Kurdish language was made illegal and it was also declared 'illegal and forbidden to introduce to, or distribute, in the country, materials in the Kurdish language of foreign origin in any form published, recorded, taped, or material in similar forms.'⁷⁰² The new military junta set up a Committee of National Front (CNF) which governed the country for a year and a half and then handed over to a civilian government following the elections of 1961.⁷⁰³

Since the inception of modern Turkey, the army has consistently played a key role as the protectorate of the Kemalist secularism in the running of the country.⁷⁰⁴ The army has staged three coup d'états in 1960, 1971 and finally in 1980 culminating in suppression and curtailment of any democratic manifestations. The aforementioned coups took place as a reaction to the popularity achieved by the left-wing organizations in the 1970s, where Kurdish groups were very active and played a prominent role.⁷⁰⁵ The power of military Kemalism was revived with more pronouncement after these three coup d'états.⁷⁰⁶ During the course of the 1971 coup the Workers Party of Turkey (*Türkiye İşçi Partisi*) was accused by the Chief Public Prosecutor of the Republic of carrying out communist propaganda and helping the Kurdish separatists by "creating a minority" in contravention of the Turkish Constitution.⁷⁰⁷ The constitutional reform implemented by the military regime following the

⁶⁹⁹ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 87.

⁷⁰⁰ Romano, 'The Kurdish Nationalist Movement', *op. cit.*, p. 40.

⁷⁰¹ W.L. Cleveland, 'A History of Modern Middle East', Westview Press, 3rd ed., 2004, p. 283.

⁷⁰² McDowall, 'a Modern History of the Kurds', *op. cit.*, p. 408.

⁷⁰³ Kendal, 'Kurdistan in Turkey', *op. cit.*, p. 65.

⁷⁰⁴ Gülistan Gürbey, 'the Development of the Kurdish Nationalist Movement in Turkey since the 1980s', in R. Olson (ed.), 'the Kurdish Nationalist Movement in the 1990s', KentuckyU.P., 1996, pp. 9-37, p. 12; for information regarding the connection between the military and state, politics and democracy in Turkey see Metin Heper, 'the State, the Military and Democracy in Turkey', *Jerusalem Journal of International Relations*, Vol. 9, No. 3(1987), 52-64.

⁷⁰⁵ Van Bruinessen contributes the radicalization of the Kurdish political parties in 1970s to the 'Kurdish urbanization voluntary and involuntary immigration of Kurdish villagers to cities and the inability of strained Turkish economy to absorb them into mainstream life.' Van Bruinessen, 'The Kurds in Turkey', *op. cit.*, p. 9.

⁷⁰⁶ Yildiz & Breau, 'the Kurdish Conflict', *op. cit.*, p. 11.

⁷⁰⁷ The Workers Party signed its death warrant when in its Fourth Congress on 29-31/10/1970, it adopted a declaration which referred to "the Kurdish People"; "*Türkiye İsci Partisinin Kapatılması Kararı*" (The Constitutional Court Decision Closing the Turkish Worker's Party), cited in Huri Tursan, 'Democratization in Turkey: the Role of Political Parties', Inter-University Press, 2004, p. 105.

1971 coup repealed any fragments of liberal measures of 1961 Constitution and allowed the government to withdraw fundamental democratic rights.⁷⁰⁸ All political institutions such as the leftist youth organizations were outlawed, strikes pronounced illegal and all left-wing publications were banned.⁷⁰⁹ Martial law (to be renewed every two months) was declared in eleven provinces together with main Kurdish urban regions and districts.⁷¹⁰ Hundreds of intellectuals, and Worker's Party campaigners were detained and tortured; any manifestations of dissent were promptly and harshly dealt with by special courts.⁷¹¹ These courts put more than 3000 people on trial before their abolition in 1976. These courts were restored by the 1982 Constitution, enacted after the military takeover of the civilian government in 1980.⁷¹² This period of Turkish history was plagued by political violence between the right and the left, particularly in the second half of the 1970s.⁷¹³ One of the most extreme examples of this trend was the massacre of more than 100 people in 1978, in the south eastern town of *Kahramanmaraş* by the notorious right wing organization Grey Wolves, an illegal militant paramilitary wing of the National Movement Party (NHP).⁷¹⁴ This harsh treatment of ethnic Kurds was to be one of the main reasons for the Kurdish revolt of 1984 led by the PKK.

2.10.2 The 1980 military Coup d'état in Turkey

As mentioned above, left wing organizations including Kurdish ones became popular and powerful in the late 1970s that prompted the army to stage yet another coup under the leadership of the Chief of Staff General Kenan Evren on 12 September 1980.⁷¹⁵ The military seized all executive and legislative powers under the pretext of restoring law and order as well as democracy to the country by imposing martial law throughout Turkey.⁷¹⁶ In fact:

The coup marked the third time that the Turkish military had intervened in politics since the late 1940s. Unlike the previous two interventions, however, the military did not give up control of the legislative and executive branches of the government easily ...

⁷⁰⁸ The Turkish Constitution of 1961 had granted Turkish citizens a few democratic rights such as freedom of thought and of the press, the right to form association and independent trade unions, the right to attend public meetings and freedom from violations of a citizen's home or person. Kendal, 'Kurdistan in Turkey', *op. cit.*, p. 66; Yildiz & Muller, 'the EU & Turkish Accession', *op. cit.*, p. 14.

⁷⁰⁹ Entessar, 'Kurdish Ethnonationalism', *op. cit.*, p. 88-89.

⁷¹⁰ F. Ahmad, 'the Making of Modern Turkey', Routledge, 1993, p. 152.

⁷¹¹ Y. Alexander & E.H. Brenner, 'Turkey, Terrorism, Civil Rights, and the EU', Routledge, 2008, p.131.

⁷¹² J.R. Crowley Program, 'Justice on Trial: State Security Courts, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey', *Fordham International Law Journal*, Vol. 22(5), 1999, Article 9, p. 2131.

⁷¹³ R. Oliver, *Turkey Today: a European Country?*, Anthem Press, 2005, p. 170.

⁷¹⁴ E-J Zürcher, 'Turkey: A Modern History', I.B. Tauris, P. 263.

⁷¹⁵ W.M. Hale, 'Turkish Politics and the Military', Routledge, 1993, p. 232.

⁷¹⁶ Entessar, 'Kurdish Ethnonationalism', *op. Cit.*, p. 95.

it was not until the elections of late 1983 that a civilian cabinet and parliament were established.⁷¹⁷

It is worth noting that the role of the military in Turkish politics is strengthened by the means of constitutional-legal mechanisms, such as the so-called “National Security Council” (NSC), the army is granted a constitutionally secured position as the very custodians of secularism and Kemalist values.⁷¹⁸ The military government created a new constitution which elevated the role of the president, dissolved the two-chamber parliament, and granted new decision-making powers to the NSC, dominated by the military.⁷¹⁹ The NSC was established after the first military intervention of 27 May 1960 in order to provide the army a legally fortified position in the running of the state without clearly defined limits.⁷²⁰ In the aftermath of the 1980 *coup* the crackdown on the Kurdish population was particularly harsh due to their portrayal as a threat to the national security of Turkey, for instance, the use of the term ‘Kurdish’ was totally banned in 1983, as well as Kurdish language and any other manifestations of Kurdish culture and identity.⁷²¹

2.10.3 The emergence of the Kurdistan Workers’ Party (PKK)

In the past, a number of Kurdish political parties were formed and subsequently disbanded by the Turkish Constitutional Court on the basis of imperilling the unity of the state.⁷²² The PKK

⁷¹⁷ Ibid.

⁷¹⁸ The National Security Council (NSC) was incorporated into the Constitution of 1961 (Article 11) after the coup of 1960, Gurbey, ‘The Kurdish National Movement in Turkey since the 1980s’, *op. cit.*, p. 12

⁷¹⁹ Article 66 of the 1982 Constitution elaborates on the racial notion of Turkish identity as: “Everyone bound to the Turkish state through the bond of citizenship is a Turk”; M.M. Gunter, ‘the Kurds and Future of Turkey’, *op. cit.*, pp. 51-52

⁷²⁰ The constitution determined two important tasks of the NSC (Article 118, Turkish Constitution 1982): on one hand, the protection and defence of “national security” against internal and external dangers and, on the other hand, the “definition, determination, and application of a national security policy,” based on the principle of the indivisible unity of a state’s people and its territory according to the Kemalist state doctrine. Gurbey, ‘the Development of the Kurdish Nationalist Movement in Turkey since the 1980s’, *op. cit.*, p. 12.

⁷²¹ In particular, Law 2932 of 19 October 1983 (repealed by Law 3713, 12 April 1991) was enforced ‘In order to protect the indivisible unity of the state, with its land and nation; the national sovereignty, the national security, and public publication of ideas other than the first official language of each country which recognizes the republic of Turkey’ (Article 2). ‘The mother tongue of the Turkish citizen is Turkish. It is forbidden: (a) to develop any form of activity in which a language other than Turkish is used and disseminated as the mother tongue; (b) at gatherings, or demonstration to carry posters, banners, signs or other such objects written in another language ... or to broadcast in records, tapes or video-cassettes, or other objects of the media in another language, without the consent of the highest official in the region’ (Article 3); Yildiz & Muller, ‘The EU and Turkish accession’, *op. cit.*, pp. 106-107.

⁷²² Under Article 69(5) of the Turkish Constitution, the Constitutional Court has power to dissolve political parties. Article 68(4) states ‘the statutes and programs of political parties shall not be in conflict with the indivisible integrity of the state with its territory and nation, human rights, national sovereignty, and principles of the democratic and secular Republic.’ See also Article 14 (Prohibition of Abuse of Fundamentals Rights and

was the most prominent of left wing Kurdish organizations to emerge in the 1970s.⁷²³ The history of the PKK has been dominated by its leader Abdullah Öcalan.⁷²⁴ Undeniably, as a result of its armed campaign against the Turkish government, the PKK has become a significant non-state actor in the Middle East and the Kurdish issue is now featured prominently in the international arena.⁷²⁵ Its origins can be traced back to Kurdish university students in Ankara that organized the Ankara Democratic Patriotic Association of Higher Education.⁷²⁶ It has been noted that the PKK, 'emerged not in the guerrilla camps on the rugged terrain of south-east Turkey, and not in any other neighbouring country in the Middle East, but in Turkey's capital city in 1974'.⁷²⁷ The founders of the PKK were very much inspired by Lenin's principle of "self-determination of nations" and Stalin's book, *the National Question*.⁷²⁸ They concentrated their activities on obtaining recognition for the Kurdish language and culture.⁷²⁹ However, the PKK in its present guise was founded on 27 November 1978, when, in the village of Fis in Diyarbakir, the nucleus of the PKK was established and the first draft of party program was announced.⁷³⁰ In the beginning of its campaign, the PKK enjoyed considerable following within the Kurdish population in eastern Turkey, some of the major cities of Turkey (with sizeable Kurdish populations) and crucially in some Kurdish diaspora in Western Europe.⁷³¹ The latter, is of great importance to the organization, particularly in terms of their financial support and generating publicity abroad.⁷³² In contrast, some have argued that it is not representative of the whole of the

Freedoms)<http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf>.

⁷²³ Kurdish Socialist Party of Turkey (KSPT) was also established in 1974, the same year in which the PKK was formed, the Kurdish members of the Kurdish Workers' Party, formed a new and purely Kurdish Marxist party, named the Kurdish Socialist Party of Turkey (KSPT). Many of its members were imprisoned or live in exile outside Turkey. Izady, 'the Kurds: a Concise Handbook', *op. cit.*, p. 217.

⁷²⁴ A. Marcus, 'Blood and Belief: the PKK & the Kurdish Fight for Independence', New York U.P., 2009, p. 33.

⁷²⁵ H.J. Barkey & G.E. Fuller, *Turkey's Kurdish Question* (New York, NY: Rowman and Littlefield, 1998), see especially chapter 2, p. 28
<<http://carnegie.org/fileadmin/Media/Publications/PDF/Turkey's%20Kurdish%20Question.pdf>>.

⁷²⁶ After its formation in 1974, "Ankara Democratic Patriotic Association of Higher Education", expanded its sphere of influence beyond the university circles and became actively involved with other segments of Kurdish society; Entessar, 'Kurdish Politics in the Middle East', *op. Cit.*, p. 123; Ismet G.Ismet, 'The PKK: A Report on Separatist Violence in Turkey (1973-1992)', Turkish Daily News Publications, 1992, p. 9.

⁷²⁷ Ismet, 'The PKK: A Report on Separatist Violence in Turkey', *op. cit.*, p. 9.

⁷²⁸ Ergil, 'PKK: the Kurdish Workers' Party', *op. cit.*, p. 328.

⁷²⁹ A. Marcus, 'Blood and Belief', *op. cit.*, p. 21.

⁷³⁰ It has been noted that 'although the organization itself used the name National Liberation Army in 1974 and changed it to PKK in 1978, they came to be known among the local people as vicious *Apocus*.' Ihsan Bal & Sedat Laciner, 'Ethnic terrorism and the Case of the PKK: Roots, Structure, Survival, and Ideology', *Ankara Paper* 9, 2004, 1-83, p. 24

⁷³¹ V. Eccarius-Kelly, 'the Militant Kurds: A Dual Strategy for Freedom', Praeger Security International, 2010, p. 93

⁷³² A.J. Lyon & E.M. Ucarer, 'Mobilizing Ethnic Conflict: Kurdish Separation in Germany and the PKK', R. Koslowski (ed.) 'International Migration and Globalization of Domestic Politics', Routledge, 2005, pp. 62-82.

Kurdish population of Turkey and beyond.⁷³³ It is important to remember that the PKK as a NSAG accepts violence as a political means, not only against the central government but also used against its Kurdish political adversaries.⁷³⁴ The PKK has sought to free the Kurds both from the Turkish yoke and the Kurdish *aghas* (feudal landlords) who it claims exploit the Kurdish peasantry.⁷³⁵

Prior to the *coup* of 1980, some of the key PKK leaders had managed to flee to Syria and the Bekaa Valley in Lebanon.⁷³⁶ Öcalan eventually set up base in Syria with the alleged approval of the government there.⁷³⁷ Although the Syrian government has never accepted providing support for Öcalan, it is quite obvious that no NSAG of the scale of the PKK could survive without the full support of a state such as Syria on whose territory the PKK was based in.⁷³⁸ From the beginning of its violent campaign, the PKK demanded that the Kurds choose between loyalty to Turkey or support for the PKK, any dissent would be met with brutal and swift punishment.⁷³⁹ Öcalan demanded that, ‘anybody who opposed the PKK, were collaborators with the Turkish government and betrayers of Kurdish freedom, whatever their ethnic origins or political aspirations for the Kurdish groups were.’⁷⁴⁰

Inability of Turkey to come to terms ‘with its Kurdish citizens’ demand for cultural recognition not only prevented a peaceful resolution to the Kurdish problem but also impeded improvement in the country’s legal and political standards.’⁷⁴¹ This has been demanded of Turkey by the European Union (EU) as part of its accession procedure to improve its human rights record particularly in relation to its Kurdish citizens’ minority rights.⁷⁴² It is worth remembering that, according to the Treaty of Lausanne in 1923, only the rights of religious minorities such as the Jews and Armenians were recognized in the Turkish Constitution of

⁷³³ Gülistan Gürbey, ‘Peaceful Settlement of Turkey’s Kurdish Conflict through Autonomy’, in F. Ibrahim & G. Gürbey (ed.), ‘The Kurdish Conflict in Turkey: Obstacles and Chances for Peace and Democracy’, St. Martin’s Press, 2000, p. 78.

⁷³⁴ Gülistan Gürbey, ‘Peaceful Settlement of Turkey’s Kurdish Conflict’, *op. cit.*, p. 78.

⁷³⁵ H.J. Barkey, ‘Turkey and the PKK: A Pyrrhic Victory?’, in R.J. Art & L. Richardson, ‘Democracy and Counterterrorism: Lessons from the Past’, US Institute of Peace Press, 2006, p. 347.

⁷³⁶ Ismet, ‘the PKK: a Report on Separatist Violence in Turkey’, *op. cit.*, p. 29.

⁷³⁷ Gunter, ‘the Kurds and Future of Turkey’, *op. cit.*, p. 26.

⁷³⁸ McDowall, ‘a Modern History of the Kurds’, *op. cit.*, p. 422; Bal & Laciner, ‘Ethnic terrorism and the Case of the PKK’, *op. cit.*, p. 27.

⁷³⁹ D.L. Philips, ‘Disarming, Demobilizing, and Reintegrating the Kurdistan Workers Party’, *National Committee on American Foreign Policy*, 15 October 2007, p. 3.

⁷⁴⁰ Bal & Laciner, ‘Ethnic terrorism and the Case of the PKK’, *op. cit.*, p. 26.

⁷⁴¹ Doğu Ergil, ‘PKK: the Kurdish Workers’ Party’, in M. Heiberg et al, ‘Terror, Insurgency, and the State: End Protracted Conflicts’, Pennsylvania U.P., 2007, 322-356, p. 323.

⁷⁴² Generally see K.Yildiz & M.Muller, ‘The European Union and Turkish accession: Human Rights and the Kurds’, Pluto Press, 2008.

1924.⁷⁴³ This has been described as one of the symptoms of the failure of Turkish democracy that does not recognize the ethno-cultural minority groups such as the Kurds.⁷⁴⁴

2.10.3.1 Political and military structure of the PKK

In contrast to other Kurdish NSAGs in the past, the PKK has a significant structure and considerable organizational ability to shape its rank and file within the communities it operates.⁷⁴⁵ The PKK considers itself foremost as a political party that has taken up arms to achieve its political goals.⁷⁴⁶ Although the political philosophy of the PKK was based on Marxism-Leninism, it had to integrate religious elements in the last decade in order to broaden its appeal within the largely Muslim Kurdish society.⁷⁴⁷ The PKK adopted the same political philosophy as the Komala in Iran that blended Marxism-Leninism with a strong dose of Kurdish nationalism.⁷⁴⁸ What distinguished the PKK from other Kurdish organizations is that it initially advocated the establishment of a separate Kurdish Marxist republic in south-eastern Turkey with ultimate aim of uniting all the Kurdish territories under the umbrella of a united Kurdistan.⁷⁴⁹ Nevertheless, in the early 1990s after the military defeat, the PKK changed direction and no longer refers to the establishment of a separate Kurdish state.⁷⁵⁰ It has ever since concentrated its political efforts on creating a federal system within Turkey.⁷⁵¹ The PKK from the beginning of its campaign against the Turkish Government adopted a dual-policy of political and military strategy similar to those of other Kurdish organizations in Iraq and Iran in the second half of the twentieth century.⁷⁵² Although the PKK started as a

⁷⁴³ There was, however, no mention of cultural rights of the Kurdish minority. In particular see Article 39 of the Lausanne Treaty of 1923 which pledges the respect for the language rights of “any Turkish national” including those who were not of Turkish Ethnic origin, was systematically neglected.

⁷⁴⁴ Ergil points out that this is not limited to the Kurdish population and other minorities such as Armenians, Greeks, Alevite Arabs, Romani, Domari, and Lazi speakers have also suffered from discrimination and repression; Ergil, ‘PKK: the Kurdish Workers’ Party’, *op. cit.*, p. 323.

⁷⁴⁵ M. van Bruinessen, ‘Between Guerrilla War and Political Murder: the Workers Party of Kurdistan’, *MERIP Middle East Report*, No. 153 (July-August 1988), 40-46, p.43.

⁷⁴⁶ Eccarius-Kelly, ‘the Militant Kurds’, *op. cit.*, p. 4.

⁷⁴⁷ In order to achieve this, the PKK set up sub-organizations such as the association of Alevis of Kurdistan or the association of Kurdish believers; Gürbey, ‘Peaceful Settlement of Turkey’s Kurdish Conflict Through Autonomy’, *op. cit.*, p. 79.

⁷⁴⁸ Entessar, ‘Kurdish Ethnonationalism’, *op. Cit.*, p. 94.

⁷⁴⁹ Suha Bolukbasi, ‘Ankara, Damascus, Baghdad, and the regionalization of Turkey’s Kurdish secessionism’, *Journal of South Asian and Middle Eastern Studies* 14, No. 4 (Summer 1991): pp. 16-19.

⁷⁵⁰ Marcus, ‘Blood and Belief’, *op. cit.*, p. 242.

⁷⁵¹ See Abdullah Öcalan, ‘the Declaration of Democratic Confederalism’, 02 April 2005 <<http://www.kurdmedia.com/article.aspx?id=10174>>.

⁷⁵² As noted above, in the second half of the twentieth century the KDP-Iran and KDP-Iraq have had an armed wing as well as a political party, the same *modus operandi* as the Irish Republican Army (IRA) in Northern Ireland and the Basque National Liberation Movement (ETA) in Spain.

group with twenty militants in 1978, however, by 1994 it is estimated that its operatives were at around 15000.⁷⁵³ Gürbey opines that ‘in contrast to the Kurdish uprisings in Turkey thus far, the PKK is characterized by a broad organizational structure and a force capable of extraordinary mobilization. It possesses a network not only in the Kurdish parts of Turkey and other countries in the region but also in western Europe.’⁷⁵⁴ It is based on three separate administrative branches, namely; the politburo or the central committee (the only existing body dating back to the creation of the PKK) was at the top of the organization under the command of Öcalan until his eventual arrest in 1999; the ERNK, the Liberation Front of Kurdistan (*Eniya Rizgariya Netewa Kurdistan*) the political wing, was created in 1985, and the ARGK (*Arteshen Rizgariya Gelli Kurdistan*) the armed propaganda wing was created in 1986.⁷⁵⁵ The ERNK has played a pivotal role in coordinating the activities of the PKK within Turkey and Europe.⁷⁵⁶ All of these bodies have altered in size throughout its armed campaign according to operating objectives and operating context.⁷⁵⁷ It has been noted that the PKK ‘... recruits guerrillas in both the Kurdish regions of crisis and among the Kurds living in

⁷⁵³ Bal & Laciner, ‘Ethnic terrorism and the Case of the PKK’, *op. cit.*, p. 28.

⁷⁵⁴ Gürbey, ‘the Kurdish Nationalist Movement in Turkey’, *op. cit.*, p. 24.

⁷⁵⁵ ‘The ERNK was divided into two parts, the first, the Domestic Central Office, consists of dozens of sub-committees, such as association of Patriotic Kurdish Workers, the Association of Patriotic Kurdish Youth and the Association of Patriotic Kurdish Teachers. The second part of ERNK organized itself in foreign countries under the administrative name of the ERNK Foreign Central Office, and was mainly responsible for the financing of the organization fighting on behalf of the Kurdish people’; Bal & Laciner, ‘Ethnic terrorism and the Case of the PKK’, *op. cit.*, p. 28.

⁷⁵⁶ In his seminal study of the PKK, Ismat says the activities of the ERNK in two regions Europe and Turkey: the responsibilities of the ERNK in Europe was as follows:

- (1) liaison with the PKK leadership;
- (2) contacts with terrorist groups in Turkish Territory such as the Revolutionary Youth;
- (3) contacts with the PKK bases in Syria, Iran, Iraq and Greece;
- (4) all propaganda activities inside and outside Turkey;
- (5) collecting money and information for the PKK;
- (6) staging demonstrations and protests to attract attention to the PKK;
- (7) finding new recruits and training them for the ARGK;
- (8) and camouflaging ERNK militants.

The ERNK unit in Turkey was mainly responsible for:

- (1) generating recruits for the EARGK;
- (2) coordinating and organizing PKK activities in urban and rural settlements;
- (3) information and intelligence gathering for the PKK;
- (4) collecting money for the organization;
- (5) organizing mass riots, urban rebellions and small scale military attacks;
- (6) trying to take on judiciary police responsibilities in areas where there was a vacuum of authority, showing the PKK’s strength to the public and trying to act as a government;
- (7) and carrying out Islamic activities and propaganda on behalf of the PKK, which became important after the failure of Marxism. This last duty was issued to the ERNK after the publication in 1990 of the book of Institutions of the Urban Revolution. This work outlined how to counteract the anti-religious image of the organization, after recognizing the strong religious tendencies amongst the people of the region. Ismet, ‘The PKK: A Report on Separatist Violence in Turkey’, *op. cit.*, p. 16.

⁷⁵⁷ K. Yildiz & S. Breau, ‘the Kurdish Conflict: International Humanitarian Law and Post-Conflict Mechanism’, Routledge, 2010, p. 15.

Western Europe.⁷⁵⁸ It is significant to note that the PKK has many women fighters among its ranks especially since the 1990s and the number increased to 30 per cent of its fighting force at the height of the conflict.⁷⁵⁹ The PKK as a NSAG is highly disciplined and has a structure based on small guerrilla units led by a hierarchy of commanders.⁷⁶⁰ During its first campaign which lasted from 1984 to 1999, the PKK tried unsuccessfully to control large swaths of territory especially at night as well as launching large-scale attacks on military outposts.⁷⁶¹ In the beginning of its campaign the PKK, due to its guerrilla tactics was very successful in hurting regular Turkish troops, who were inexperienced and ill-equipped to deal with guerrilla warfare.⁷⁶² Indeed, it continued to maintain military superiority over the Turkish military throughout the 1980s.⁷⁶³ These early losses convinced the Turkish army and the police force to adopt a different approach and train special units specifically for combatting guerrilla warfare.⁷⁶⁴ By 1995, this change of tactics to a counter-insurgency strategy and the use of Cobra Helicopters in hot pursuit operations also extended to incursions into northern Iraq, proved to be very successful tactics for the Turkish army and security services. The latter incursions into northern Iraq in hot pursuit of the PKK by Turkey raises very important legal issues in relation to the use of force (*jus ad bellum*) by a sovereign state against a NSAG, a topic which will be discussed more extensively below.

2.10.3.2 PKK's revolt of 1984

As we have already observed, since 1918 the three Kurdish entities under consideration have been beset by the spectre of armed conflict in the shape of revolts against the sovereign states who host these Kurdish communities. None of these revolts has attracted so much international attention as the conflict in south-eastern Turkey since 1984 waged by the PKK

⁷⁵⁸ Gürbey, 'the Kurdish Nationalist Movement in Turkey', *op. cit.*, p. 24.

⁷⁵⁹ This is rather unusual phenomenon in a male-dominated Tribal Kurdish society to have such a high number of the PKK fighters. Ali Ozcan Nihat, 'PKK Recruitment of Female Operatives', Global Terrorism Analysis, the Jamestown Foundation, Vol. 4, Issue 28, September 11, 2007; see also Marcus, 'the Blood and Belief', *op. cit.*, p. 173.

⁷⁶⁰ Marcus, 'Blood and Belief', *op. cit.*, p. 108; Yildiz Breau, 'the Kurdish Conflict', *op. cit.*, p. 15.

⁷⁶¹ G. Jenkins, PKK Changes Battlefield Tactics to Force Turkey into Negotiation (The Jamestown Foundation) <http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=4494>.

⁷⁶² 'Provision to Turkey of US Intelligence on PKK Highlights Policy Shift', 7 November 2007 <http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=4520>.

⁷⁶³ Ergil, 'PKK: the Kurdish Workers' Party', *op. cit.*, p. 325.

⁷⁶⁴ Barkey, 'Turkey & the PKK', *op. cit.*, p. 345.

against the Turkish army.⁷⁶⁵ The armed campaign waged by the PKK is the longest against a sovereign state by a Kurdish NSAG since the end of the World War I.⁷⁶⁶ In total the conflict in south-eastern Turkey has cost 37000 lives, including civilians, a large proportion of whom were Kurdish and a huge burden on the Turkish economy.⁷⁶⁷ According to Ihsan Bal the factors that contributed to the PKK revolt were issues such as, unsolved economic underdevelopment in the Kurdish region, the military *coup* of 1980, some errors of judgment made by the state such as banning of the Kurdish language and other manifestations of the Kurdish identity, and finally the creation of the *de facto* Kurdish Regional Government (KRG) in northern Iraq in the aftermath of the first Persian Gulf war in 1991.⁷⁶⁸ Human Rights Watch Reports estimate that at the peak of the conflict in 1995, approximately around 400,000 troops were present in south-east Turkey with additional 240,000 troops sent to the region in 2006.⁷⁶⁹ Indeed, this would indicate that the conflict at the time was at the least an insurgency due to its intensity and the size of the military operation involved, in spite of, being initially confined to south-eastern Turkey.

The PKK began its armed campaign against the Ankara government in 1984, by launching its first major large scale armed attack on the gendarmerie station building in Erzurum district of Siirt and as a result, one *gendarme* was killed, six soldiers and three civilians were wounded.⁷⁷⁰ This was in spite of the fact that by 1983 it was widely believed that armed opposition in Turkey had been defeated.⁷⁷¹ This assumption was based on the belief that after the military coup of 1980, due to draconian measures imposed nation-wide on all political parties in Turkey which included the arrest of over 500,000 people, no political opposition had survived.⁷⁷² The emergence of and the danger posed by the PKK was not foreseen by

⁷⁶⁵ *Partiya Karkerên Kurdistan (PKK)*; for a brief history see 'History of PKK in Turkey', *Hürriyet Daily News*, 14 September 2009 <<http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=history-for-the-pkk-in-turkey-2009-09-14>>.

⁷⁶⁶ The Conflict has lasted longer than the major armed struggle of the KDP-PUK against the Iraqi Government; Barkey & Fuller, *Turkey's Kurdish Quest*, *op. cit.*, p. 28.

⁷⁶⁷ Pam O'Tool, 'Profile: the PKK', BBC, 15 October 2007 <<http://news.bbc.co.uk/1/hi/world/europe/7044760.stm>> ; According to the Turkish Minister of Labor and Social Security Faruk Çelik, the conflict against PKK since 1984 has cost Turkey \$400 billion. However, Servet Mutlu, a professor of Economics at the Ankara-based Başkent University estimates the cost to the Turkish economy a loss of \$88 billion between the years of 1984 and 2005. 'PKK Terror Could Cost the Turkish Economy up to \$400 billion', Elif Firat, *Today's Zaman*, 2 October 2011.

⁷⁶⁸ Bal & Laciner, 'Ethnic terrorism and the Case of the PKK', *op. cit.*, p. 25.

⁷⁶⁹ Human Rights Watch Report: 'Weapons Transfers and Violations of the Laws of War in Turkey', 1995 <http://www.hrw.org/legacy/reports/1995/Turkey.htm#P167_13484>.

⁷⁷⁰ According to the Turkish Weekly, another armed attack launched on the gendarmerie open air facility, officer housings and gendarmerie stations in Semdinli district of Hakkari in which one Officer, one petty officer and one soldier were wounded.

⁷⁷¹ McDowall, 'A Modern History of the Kurds' *op. Cit.*, p. 420.

⁷⁷² Amnesty International, *Turkey: Human Rights Denied* (London: Amnesty International, 1988), p. 1.

many Turkish officials.⁷⁷³ In fact, this complacency was not limited to the political class and it also existed among the military ranks.⁷⁷⁴

Some observers have opined that ‘the PKK differs from other Kurdish organizations on the issue of violence ... the armed fight that the PKK has led since August 1984 is based on “revolutionary violence” as a means of achieving mobilization and liberation.’⁷⁷⁵ From the beginning, the PKK directed its violent campaign not only against the Turkish Government, right and left-wing political parties, the Kurdish landlord class and the village guards.⁷⁷⁶ The “village guards” is a state mandated but largely unregulated paramilitary force of 65,000 organized by the Turkish Government consisting of those Kurdish tribes and villagers who resisted the PKK.⁷⁷⁷ This paramilitary organization has played an important role in thwarting the PKK and to regain the control of the countryside by the Turkish government.⁷⁷⁸ The inadequate supervision of the village guards has exacerbated lawless violence in the rural areas in south-eastern Turkey.⁷⁷⁹ They have been accused of some of the most serious human rights violations in south-eastern Turkey.⁷⁸⁰ In the early days of its armed campaign, its main objective was to attack high-profile targets to generate as much publicity and to show the Kurdish population that it was a force to be reckoned with. The *modus operandi* of the PKK also involved attacks on Turkish diplomatic offices throughout Europe in the 1990s, attacks on tourist centres in Turkey in an attempt to disrupt the tourist industry which is a vital source of income for Turkey.⁷⁸¹

In its third Congress (25-30 October 1986) the PKK established the Peoples’ Liberation Army of Kurdistan (ARGK) which was to expand military operations to cities and to

⁷⁷³ Bal & Laciner, ‘Ethnic terrorism and the Case of the PKK’, *op. cit.*, p. 27.

⁷⁷⁴ In the words of Lieutenant General Kaya Yazgan who was in charge of the Seventh Army Corps in the southeast at the time of the attack, ‘it was an unexpected event ... up until that point we didn’t know Apo. His name was known, but he was not someone who was focused on. And besides PKK militants were seen more as bandits ... the politicians in Ankara did not believe that this event was the first sign of a big start. It was being evaluated as the remnants of what took place before September 12 [the military coup]; cited in Marcus, ‘Blood and Belief’, *op. cit.*, p. 83.

⁷⁷⁵ Gürbey, ‘the Kurdish Nationalist Movement in Turkey’, *op. cit.*, p. 23.

⁷⁷⁶ Barkey & Fuller, Turkey’s Kurdish Question, *op. cit.*, p. 26.

⁷⁷⁷ McDowall, ‘a Modern History of the Kurds’, *op. cit.*, p. 425.

⁷⁷⁸ *Geçici ve Gönüllü Köy Korucuları* (“temporary and voluntary village guards”) was originally established and funded by the Turkish Republic in 1985 under the control of the then Turkish Premier Turgut Özal. The amendment No 3175 to Article 74 of the Law of Temporary Village Guards, enacted in 1924, was passed on 26 March 1985. Ergil, ‘PKK: the Kurdistan Workers’ Party’, *op. cit.*, p. 339.

⁷⁷⁹ Human Rights Watch, ‘Turkey: Letter to Minister Aksu Calling for the Abolition of the Village Guards’, 7 June 2006 <<http://www.hrw.org/en/news/2006/06/07/turkey-letter-minister-aksu-calling-abolition-village-guards>>.

⁷⁸⁰ The commission of human rights abuses by village guards has been highlighted by the European Court of Human Rights, inter alia *Yoyler v. Turkey*, application No 26973/95; *Ipek v Turkey*, application No 25760/94; see also Yildiz & Muller, ‘the EU and Turkish Accession’, *op. cit.*, p. 17.

⁷⁸¹ U.S. Department of State, Office of Counterterrorism, Background Information on Foreign Terrorist Organization, <http://www.state.gov/documents/organization/31946.pdf>

intensify political activity in urban areas.⁷⁸² Indeed, targeting urban conurbations heralded a new tactic unique to any of the Kurdish NSAGs involved in revolts and led to accusation and ultimately classification of the PKK as a terrorist organization.⁷⁸³ According to Lacinier and Bal, 'in war of national independence, guerrilla warfare is commonly used as a primary method and is based on the consent and support of a large portion of the people. The PKK however, lacked that support and relied on a small minority, some of whom were forced to support the organization.'⁷⁸⁴ The former Turkish General Chief of Staff Doğan Güreş, stated publicly in July 1993 that approximately one-tenth of the Kurdish population in the Kurdish regions, or roughly four hundred thousand people, must be considered as active supporters of the PKK.⁷⁸⁵

From the beginning of the conflict in 1984, the Turkish Government adopted the position that the PKK is a terrorist organization.⁷⁸⁶ Therefore, in response it has adopted very draconian military measures and political repression which include severe violations of human rights.⁷⁸⁷ On 19 July 1987, as a reaction to the deteriorating security situation in southeast of the country, the Turkish Parliament proclaimed a civil state of emergency to establish an emergency civil administration according to State of Emergency Legislation (OHAL) and appointed a regional governor in whom all powers of the state of emergency administration were vested.⁷⁸⁸ However, there was no provision for an independent judicial review of its actions which contributed substantially to the breakdown of the rule of law.⁷⁸⁹ As some observers have noted:

An atmosphere of intimidation and violence prevailed. State security forces targeted the PKK, although Kurdish rural communities were caught in the crossfire. Security operations in Kurdish villages were accompanied by arbitrary arrests, looting of moveable property, beatings, torture and disappearance. Few Kurds escaped the trauma of the actions of the security forces.⁷⁹⁰

⁷⁸² Gürbey, 'the Kurdish Nationalist Movement in Turkey', *op. cit.*, p. 23.

⁷⁸³ The PKK is listed as a terrorist organization by a number of states including the US, UK and the EU, an issue which will be discussed below.

⁷⁸⁴ Bal & Lacinier, 'Ethnic terrorism and the Case of the PKK', *op. cit.*, p. 27.

⁷⁸⁵ Gürbey, 'the Kurdish Nationalist Movement in Turkey', *op. cit.*, p. 24

⁷⁸⁶ For a reflection of the Turkish Government's attitude towards the PKK see 'PKK/KONGRA-GEL', Republic of Turkey Ministry of Foreign Affairs < http://www.mfa.gov.tr/pkk_kongra-gel.en.mfa>.

⁷⁸⁷ Yildiz & Muller, 'the EU and Turkish Accession', *op. cit.*, p. 116.

⁷⁸⁸ Under the State of Emergency Act 1983, Law No. 2935 of 25 October 1983, RG No. 18204 of 27 October 1983. Yildiz & Muller, 'the EU and Turkish Accession', *op. cit.*, p. 16.

⁷⁸⁹ Yildiz & Muller, 'the EU and Turkish Accession', *op. cit.*, p. 16.

⁷⁹⁰ Yildiz & Breau, 'the Kurdish Conflict', *op. cit.*, p. 17.

The ensuing violence resulted in destruction of many villages and internal displacement of as many as 4 million Kurdish villagers.⁷⁹¹ Further, in 2008, it was only as a result of the high profile court case of *Ergenekon*, involving top members of the military and civilian officials of the Turkish state that revealed the discovery of mass graves in eastern Turkey an indication of extrajudicial murders throughout that period.⁷⁹² The abovementioned case is in relation to the existence of the so-called “deep state” in Turkey involving the army, heads of police departments, businessmen and journalists of the secular press.⁷⁹³ Since 22 January 1990, Turkey accepted the jurisdiction of the European Court of Human Rights to hear individual claims, followed by a number of cases in which Turkey has been found to have violated the right to life, liberty and effective remedy.⁷⁹⁴

The closest the PKK and the Turkish Government have come to a peaceful resolution to the conflict was during the presidency of Turgut Özal in early 1990s when he proposed a peaceful resolution to the conflict.⁷⁹⁵ For the first time in the history of the Turkish Republic he admitted publicly that ‘Turkey must deal with the Kurdish problem.’⁷⁹⁶ Indeed, under his leadership there was a relaxation of domestic restrictions on the use of Kurdish language and it was during this period that some tenuous attempts were made to engage the more moderate Kurdish elements to push the PKK towards a political solution.⁷⁹⁷ In 1993, the PKK

⁷⁹¹ See report by Human Rights Watch entitled: “*Still Critical*” *Prospects in 2005 for Internally Displaced Kurds in Turkey*, March 2005 Vol. 17, No. 2(D). As an acknowledgement of the problem in May 2003, the EU’s Accession Partnership with Turkey required: “the return of internally displaced persons to their original settlements should be supported and speeded up”. European Commission, ‘2004 Regular Report on Turkey’s progress towards accession’, 6 October 2004, p. 13.

⁷⁹² Since it was first launched in 2007, the Ergenekon investigation has become the largest, most expensive, and most controversial in modern Turkish history. By May 2011, nearly 500 hundred individuals have been taken into custody and some 300 have already been charged with the membership of what the Chief Prosecutor describes as “the Ergenekon terrorist organization”. See the charges of conspiracy before the Istanbul Court of Assize for Organized Crimes and Terror Crimes: Case no 2007/1536.

⁷⁹³ Turkey ‘Ergenekon Plot’: Ex-Army Chief Basbug on Trial, BBC, 26 March 2012 <<http://www.bbc.co.uk/news/world-europe-17510436>>.

⁷⁹⁴ See *Denmark v Turkey*, Application No 34382/97, Decision on Admissibility of 8 June 1999, *Friendly Settlement*, Judgment of 5 April 2000, 39 *International Legal Materials* (2000) 788, the case was brought by a Danish citizen Kemal Coc, concerning his ill-treatment while under detention in Turkey on charges of assisting the PKK; see also *Kurt v Turkey*, Application No 24276/94, Judgment of 25 May 1998, [1998] 27 EHRR 373; *Çakici v Turkey*, Application No 23657/94. [1999] ECHR 43; *Ertak v Turkey*, Application No 20764/92, Judgment of 9 May 2000, Reports of Judgment and Decisions 2000-V; *Timurtas v Turkey*, Application No 23531/94, Judgment of 13 June 2000, Reports of Judgments and Decisions 2000-VI; and *Tas v Turkey*, Application No 24396/94, Judgment of 14 November 2000.

⁷⁹⁵ Turgut Özal was the Premier of the Turkish Republic, 1983-89 and the President, 1989-93.

⁷⁹⁶ Helsinki Watch, *Destroying Ethnic Identity: the Kurds of Turkey* (Helsinki Watch Report, March 1988), p. 4.

⁷⁹⁷ According to Gürbey the process undertaken by Özal at the time amounted to ‘... the most extensive gesture towards the Kurds living in Turkey was to legalize the Kurdish language by lifting the Language-Ban-Act of 1991. Özal supported discussions about new reforms by making proposals himself such as Kurdish radio and TV programs and introducing Kurdish in teaching, which earned him criticism from various section of society, politics, the military and media. Gürbey, ‘Peaceful Settlement of Turkey’s Kurdish Conflict through Autonomy’, *op. cit.*, p. 66.

announced a unilateral ceasefire as a gesture of good will towards the Turkish government that had for the first time addressed the Kurdish issue directly. Özal even floated the idea of a general amnesty for PKK fighters.⁷⁹⁸ He believed that ultimately there had to be a political solution in relation to the troubles in south-eastern Turkey.⁷⁹⁹ Thus, during early 1990s Özal decided to develop an integrated approach to the Kurdish problem without necessarily giving up on combating the insurgency. In order to achieve this, he even called upon the good offices of the Kurdish leaders of northern Iraq in search of a viable solution.⁸⁰⁰ However, the Turkish Government's intransigence continued and that same year in a paradoxical change of policy, President Özal announced a program of forced migration of the Kurds from south-eastern Turkey to the west of the country presumably under pressure from the army destroying any political space left to negotiate between the government and the PKK.⁸⁰¹ Nonetheless, with Özal's premature death in 1992, the reforms he had envisioned for Turkey could not be implemented.⁸⁰²

2.10.3.3 The capture of Abdullah Öcalan

The most pivotal moment in the conflict between the Turkish Army and the PKK transpired when Abdullah Öcalan, the leader of the PKK since its inception, was captured by the Turkish Special Forces in Nairobi, Kenya on 15 February 1999.⁸⁰³ Since early 1980s Öcalan had been based in Syria with the alleged support of the Syrian Government.⁸⁰⁴ However, in spite of the fact that the PKK operated out of Syria in the 1980s and 90s, the government of Syria never admitted to provide support for the PKK.⁸⁰⁵ With Turkey growing restless due to activities of the PKK in the late 1990's it threatened Syria with military action unless Syria

⁷⁹⁸ Philips, 'Disarming, Demobilizing and Reintegrating the Kurdistan Workers Party', *op. cit.*, p. 6.

⁷⁹⁹ M.M. Gunter, 'the Kurds and the Future of Turkey', Palgrave Macmillan, 1997, p. 79.

⁸⁰⁰ Barkey has noted that: 'He not only suggested that Kurdish language broadcasts and publishing be freed, but he very subtly tried to influence Turkish Kurds by making overtures to Iraqi Kurds and their leaders. He received the leaders of both the Kurdish Democratic Party and the Patriotic Union of Kurdistan, Massoud Barzani and Jalal Talabani, at his residence. He provided them with Turkish Diplomatic Passports to ease their international travels. He was instrumental in approving the US-led no-fly zone over northern Iraq, which provided the Kurds with respite from Iraqi forces. Barkey, Turkey and the PKK', *op. cit.*, p. 366.

⁸⁰¹ He called for 'a planned, balanced migration, including members of all segments of [Kurdish] society, to predetermined settlements in the West.' Yildiz & Muller, 'the EU and Turkish Accession', *op. cit.*, p. 155.

⁸⁰² Philips, 'Disarming, Demobilizing and Reintegrating the Kurdistan Workers Party', *op. cit.*, p. 6.

⁸⁰³ Abdullah Öcalan, was prosecuted for acts intended to secede part of the Turkish Territory *Öcalan v. Turkey* ECHR, App. No. 46221/99 (12 Mar. 2003); 'The Story of Öcalan's Arrest', BBC, 28 May 1999, <http://news.bbc.co.uk/1/hi/programmes/from_our_own_correspondent/283189.stm>.

⁸⁰⁴ Marcus, 'Blood & Belief', *op. cit.*, p. 99.

⁸⁰⁵ R. Olson, 'Turkey's Relations with Iran, Syria, Israel and Russia, 1991-2000: the Kurdish and Islamist Question', Mazda Publishing, 2001, especially Chapter 4, pp. 104-111.

deported him.⁸⁰⁶ Prior to his arrest after months of negotiations and bargaining Turkey and Syria reached a security agreement upon which Syria would expel Öcalan, recognize the PKK as a terrorist organization, cut off the supply of weapons, logistic material, financial support and prevent any dissemination of PKK propaganda activity from its territory.⁸⁰⁷ Hence, by reaching this agreement between the two major Middle East powers, the PKK found itself rather isolated.⁸⁰⁸ After deportation from Syria he travelled to Russia and then to Italy where his application for political asylum was rejected.⁸⁰⁹ He eventually found his way to Nairobi, Kenya where he was arrested in a secret operation by members of Turkish intelligence agents and taken back to Turkey.⁸¹⁰ There were reports that the US, Israel and Greece had collaborated in his capture.⁸¹¹ Upon his return to Turkey Öcalan was convicted for treason and sentenced to death according to Article 125 of the Turkish Republic Criminal Code which later was commuted to a life sentence.⁸¹² Until now Öcalan remains the sole inmate in a specially organized prison on Imrali Island. In the course of his trial Öcalan urged the PKK to abandon armed struggle and engage in political dialogue with the Turkish Government with the view to achieve autonomy within the unitary system of Turkey.⁸¹³ Although the PKK abandoned armed struggle, Öcalan reserved the right to self-defence in the event of an armed attack.⁸¹⁴ This unilateral ceasefire by the PKK subsequently led to a great reduction in hostilities and virtually ended the targeting of civilians.⁸¹⁵ There remained sporadic skirmishes between the PKK and the Turkish Armed Forces, as noted by the Council of Europe. Throughout the period September 1999 to June 2004 the situation had improved appreciably.⁸¹⁶ Significantly, in 2000 the PKK dropped the word “Kurdistan” in

⁸⁰⁶ ‘Turkey Makes Demands of Syria’, BBC, 7 October 1998 <http://news.bbc.co.uk/2/hi/middle_east/186565.stm>.

⁸⁰⁷ See ‘US Welcomes Turkey-Syria Agreement’, Press Statement by James Rubin, DoS, 22 October 1998; Gray & Olleson, ‘The Limits of the Law on the Use of Force: Turkey, Iraq and the Kurds’, *op. cit.*, p. 388.

⁸⁰⁸ Marcus, ‘Blood and Belief’, *op. cit.*, p. 279.

⁸⁰⁹ M.M. Gunter, ‘the Kurds Ascending: the Evolving solution to the Kurdish Problem in Iraq and Turkey’, Palgrave MacMillan, 2008, p. 60.

⁸¹⁰ ‘The Story of Ocalan Arrest’, BBC, 28 May 1999 <http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/283189.stm>.

⁸¹¹ *Keesing’s Record of World Events* (1999), 42791.

⁸¹² In 2002 in order to facilitate accession to EU, Turkey revoked the death penalty. The European Court of Human Rights held that Turkey had violated Article 6, the Right to Fair Trial and recommended a retrial for Öcalan. See *Ocalan v Turkey*, Application No 46221/99, Judgement of 12 March 2003.

⁸¹³ Marcus, ‘Blood and Belief’, *op. cit.*, p. 283; ‘PKK Ends War with Turkey’, BBC, 9 February 2000 <<http://news.bbc.co.uk/2/hi/europe/636729.stm>>.

⁸¹⁴ See the application by PKK and KNK v Council of the European Union, Case C-229/05P, PKK and KNK v Council [2007] ECR I-439 (judgement of 18 January 2007).

⁸¹⁵ See generally US DoS, ‘Country Report on Human Rights Practices for 2004: Turkey’, February 2005.

⁸¹⁶ European Commission, ‘2004 Regular Report on Turkey’s progress towards accession’, *op. cit.*, p. 38.

recognition of abandoning the aspiration of an independent Kurdish state.⁸¹⁷ At the time it claimed to advocate for advancement of cultural rights, wider democratic and legal standards by which ethnic, linguistic and political differences may be respected and protected.⁸¹⁸

The resulting lull did not last long. In September 2003 the PKK announced that due to lack of political progress with the Turkish government, it was ending the unilateral ceasefire and resuming its combat operations.⁸¹⁹ The PKK cited the concentration of 60,000 Turkish troops and heavy artillery deployed near the border of Iraq in March 2003 as a belligerent statement of intent.⁸²⁰ On its part, Turkey had somewhat erroneously assumed that with the capture and conviction of Öcalan, the PKK as an organization and the conflict would be over. However, the reality has been far from that, notwithstanding the successes of the counter-insurgency tactics of the Turkish Army in the 1990s. A low-intensity armed conflict has continued in earnest even in the first decade of the twenty-first century. Nevertheless, the on-going conflict is not of the same ferocity and intensity of the 1980s and early 1990s. In recent years, due to depletion of its military capability, the PKK has limited its operations to hit and run attacks targeting members of the army and security services as to generate as much publicity as possible. Like many other revolts or insurgencies this conflict could not have matured without an international dimension.⁸²¹ For obvious reasons in the early days of the conflict because of its capacity to call upon up to 15,000 fighters, the PKK was intent on increasing the intensity of the military action in order to turn the conflict into a fully-fledged internal armed conflict. As a consequence the conflict would have been regulated by instruments of IHL related to internal armed conflict namely, Common Article 3 and Additional Protocol II of the Geneva Conventions rather than the Turkish domestic criminal law. The PKK was unable to achieve this simply because the conflict was by and large confined to south-eastern part of Turkey and although most of its operations were transnational and carried out of the safety of northern Iraq, the conflict never reached the level of a fully-fledged armed conflict. In recent years, Turkey has taken considerable strides in democratization of its political system mainly due to harbouring aspirations of joining the European Union. On 30 May 2001, a package of 34 amendments to the 1982 Constitution was adopted, which introduced new provisions on issues such as freedom of thought and expression, the prevention of

⁸¹⁷ Yildiz & Muller, 'The EU and Turkish accession', *op. cit.*, p. 107.

⁸¹⁸ Ergil, PKK: the Kurdish Workers' Party', *op. cit.*, p. 328.

⁸¹⁹ 'Kurdish Rebels Abandon Truce', BBC, 2 September 2003 <<http://news.bbc.co.uk/2/hi/europe/3200907.stm>>.

⁸²⁰ Associated Press, 'Turkey bolsters forces along Iraqi border: US cautions against action outside coalition', 8 March 2007.

⁸²¹ Yildiz & Muller, 'the EU and Turkish Accession', *op. cit.*, p. 126-143.

torture, the strengthening of civilian authority, freedom of association, and gender equality.⁸²² Thus, by virtue of this reform the law prohibiting the use of Kurdish language in publications was repealed.⁸²³ Furthermore, as part of the process of democratization, Turkey also signed up to a number of major treaties principally due to pressure from the EU.⁸²⁴ In July 1999, it withdrew its reservations to the Convention on Elimination of All Forms of Discrimination against Women (CEDAW),⁸²⁵ and in August 2000 it signed up to the International Covenant on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR). Apart from the armed struggle carried out by the PKK Kurdish political activism in Turkey has continued unabated.⁸²⁶ As noted above, there have been many political parties which supported the demands of the Kurdish population but they were routinely deemed unconstitutional and subsequently closed down.⁸²⁷

2.10.3.4 The Union of Communities in Kurdistan (KCK)⁸²⁸

In February 2002, following the trial of Öcalan, the PKK announced its dissolution and reform as a political party namely; Kurdish Freedom and Democracy Congress (KADEK) in order to escape its terrorist designation.⁸²⁹ It stressed the wish to engage in political dialogue with the Turkish government in order to find a political solution to the conflict.⁸³⁰ This development coincided with the coming to power of the pro-Islamic the Justice and Development Party (AKP) led by Recep Tayyip Erdogan.⁸³¹ The PKK hierarchy considered this as a fresh opportunity to engage in the Turkish political process through peaceful means.⁸³² In hope of political recognition by the new administration it even decided for yet another make-over by changing its name to the Kurdish People's Congress (KONGRA-GEL)

⁸²² See European Commission, '2004 Regular Report on Turkey's progress towards accession', *op. cit.*, p. 14. Several amendments are related to the Copenhagen political criteria, the Accession Partnership and NPAA.

⁸²³ Barkey & Fuller, 'Turkey's Kurdish Question', *op. cit.*, p. 64.

⁸²⁴ See generally, Yildiz & Muller, 'the EU & Turkish Accession', *op. cit.*, pp. 22-23.

⁸²⁵ New York, 18 December 1979, in force 3 September 1981; GA Res. 34/180, 18 December 1979; UN AGOR, 34th Sess., Supplement No. 46, UN Doc A/34/46 (1980); 1249 *UNTS* 13; 19 *International Legal Materials* (1980) 33.

⁸²⁶ H.J. Barkey, 'Turkey and the PKK: A Pyrrhic Victory?', *op. cit.*, p. 343.

⁸²⁷ This trend is bound to continue in light of Turkey's European Union candidacy and the apparent democratization process that Turkey is undertaking.

⁸²⁸ *Koma Civakên Kurdistan* (KCK).

⁸²⁹ PKK becomes KADEK, 15 April 2002, see <<http://www.kurdistan.org/current-update/kadet.html>>.

⁸³⁰ *Keesing's Record of World Events*, 43430; see also US Department of State, 'Patterns of Global Terrorism 2003', April 2004, p. 56 <<http://www.state.gov/documents/organization/31912.pdf>>.

⁸³¹ *Adalet ve Kalkınma Partisi* (AKP); for background information see M. Abramovitz & H.F. Barkey, 'Turkey's Transformers: the AKP Sees Big', 88 *Foreign Affairs* 118 2009.

⁸³² H.J. Barkey, 'Turkey and the PKK: A Pyrrhic Victory?', *op. cit.*, p. 343.

without any structural, ideological or political reform from KADEK (PKK).⁸³³ This initiative was rebuffed by the Turkish government. The Turkish government has consistently maintained throughout the conflict that the PKK is a terrorism organization and it does not engage in dialogue with such organizations whose real agenda is seceding from Turkey and the establishment of a separate Kurdish state.⁸³⁴ It is worth noting that in 2003 KADEK was designated as a terrorist organization by the US Department of State.⁸³⁵

The most significant development in relation to the PKK since its formation is the establishment of the Union of Communities in Kurdistan (KCK) in March 2005 through Öcalan's *Declaration of Democratic Confederalism in Kurdistan*.⁸³⁶ KCK has been described as the umbrella organization bringing together the PKK and Kurdistan Free Life Party (PJAK) of Iran, the much smaller PKK allies Democratic Union Party (PYD) of Syria led by Fuat Omer and Kurdistan Democratic Solution Party led by Faiq Gulpi in Iraq.⁸³⁷ As of 2012, Murat Karayilan, the acting PKK leader serves as the chairman of the 12-person Executive Council of the KCK. Karayilan claims to have up to 8,000 fighters under his control, half of are based in Qandil mountains in northern Iraq and the other half are distributed throughout various provinces in Turkey.⁸³⁸ Turkish authorities claim KCK an urban arm of the PKK.⁸³⁹ Since 2009, some 1,800 individuals have been prosecuted for alleged membership of the KCK by the Turkish judiciary. As of March 2012, the detainees included six MPs of the Main Kurdish Peace and Democracy Party (BDP).⁸⁴⁰ According to the report on 'Turkey-UK Relations and Turkey's Regional Role', by the Foreign Affairs Committee of the UK Parliament in 2012, there has been:

... An intensified and sweeping wave of arrests of activists, journalists and lawyers, officials and elected politicians of the main Kurdish political party, the BDP, for terrorism-related offences, on the basis of alleged links to the KCK. By early 2012,

⁸³³ 'Country Reports on Terrorism 2004', United States Department of State, Office of the Coordinator for Counterterrorism, April 2005 <<http://www.state.gov/documents/organization/45313.pdf>>.

⁸³⁴ Turkish Ministry of Foreign Affairs, 'A Case Study of the PKK in Turkey' <http://www.mfa.gov.tr/pkk_kongra-gel.en.mfa>.

⁸³⁵ US State Department, Iraq: Country Report on Human Rights Practices, 25 February 2004 <<http://www.state.gov/j/drl/rls/hrrpt/2003/27928.htm>>.

⁸³⁶ Öcalan, 'the Declaration of Democratic Confederalism in Kurdistan', *op. cit.*

⁸³⁷ M.M. Gunter, 'Historical Dictionary of the Kurds', scarecrow Press, 2011, p. 164-5.

⁸³⁸ Eccarius-Kelly, 'the Militant Kurds: a Dual Strategy for Freedom', *op. cit.*, P. 212.

⁸³⁹ A. Christie-Miller, 'the PKK and the Closure of Turkey's Kurdish Opening', *MERIP*, 4 August 2010 <<http://www.merip.org/mero/mero080410>>.

⁸⁴⁰ 'Turkey: Arrests Expose Flawed Justice System', Human Rights Watch, 01 November 2011 <<http://www.hrw.org/news/2011/11/01/turkey-arrests-expose-flawed-justice-system>>.

thousands of people were reckoned to be on trial for such offences, with hundreds subject to pre-trial detention; the BDP's had been severely disrupted.⁸⁴¹

As discussed above, one of the main purposes of the establishment of KCK was to coordinate military and political activities of non-state Kurdish groups in states with Kurdish population and manifestation of this collaboration between various Kurdish groups has been felt over the border in Iran.

2.11 Party for a Free Life of Kurdistan (PJAK)⁸⁴²

As touched upon before, since 1979, Iran has been ruled by a theocratic regime that is increasingly being challenged by collective display of peaceful political activism and by a number of armed groups claiming to stand for the advancement of the interest of sectarian and ethnic minorities who see themselves as primary victims of the state-directed oppression.⁸⁴³ PJAK is a new Iranian Kurdish militant nationalist group (NSAG) which held its first Congress on 25 March 2004 and has a close association with the PKK.⁸⁴⁴ The group has been engaged in low-intensity armed conflict with the Iranian security forces in Iran-Iraq border region since 2006.⁸⁴⁵ PJAK claims to be fighting for the autonomy of the Kurds within a federal and democratic Iran.⁸⁴⁶ It is driven by an ideology which combines Kurdish nationalism with secular and socialist principles.⁸⁴⁷ Many Iranian Kurds who are actively involved in peaceful political campaigns are frequently victims of human rights abuses by the Iranian regime under the pretext of collaboration with terrorist organizations.⁸⁴⁸ PJAK claims that having exhausted all avenues through peaceful means to resolve its differences with the central government, it was left with no choice but to take up arms.⁸⁴⁹ The precise origin of

⁸⁴¹ Published by the United Kingdom Parliament, 04 April 2012 <<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1567/1567.pdf>>.

⁸⁴² *Partiye Jiyana Azad a Kurdistan* (Party for a Free Life of Kurdistan, PJAK).

⁸⁴³ It is ironic that Iran has been the main sponsor of NSAGs such as Hamas in the Palestinian Authority and Hezbollah in Southern Lebanon to name a few and it is facing the same problem on its territory in the shape of NSAGs such as the Kurdish group PJAK and Jundullah Sunni Militant Group in the South-eastern province of Sistan and Baluchestan. See 'Iran hangs the leader of the Jundullah Sunni militant, blamed for a string of attacks on its elite revolutionary guards', BBC, 20 June 2010 <<http://www.bbc.co.uk/news/10359415>>.

⁸⁴⁴ Gunter, 'Historical Dictionary of the Kurds', *op. cit.*, p. 177.

⁸⁴⁵ The armed wing of PJAK is known as the East Kurdistan Defence Forces.

⁸⁴⁶ See PJAK's official website; <<http://pjak.org/english>>.

⁸⁴⁷ C. Zambelis, 'The Factors behind Rebellion in Iranian Kurdistan', *Combating Terrorism at West Point*, 1 March 2011 <<http://www.ctc.usma.edu/posts/the-factors-behind-rebellion-in-iranian-kurdistan>>.

⁸⁴⁸ For an assessment of human rights abuses in Iranian Kurdistan see 'Iran: Human Rights Abuses against the Kurdish Minority', Amnesty International 2008 <<http://www.amnesty.org/en/library/info/MDE13/088/2008/en>>.

⁸⁴⁹ <<http://pjak.org/english.php?id=1587>>.

PJAK is somewhat in doubt but it could be traced to 1997 to a peaceful student-based human rights organization inspired by the success of the Iraqi Kurds and the PKK in Turkey.⁸⁵⁰ In 1999 due to harsh crackdowns carried out by the Iranian government on various political organizations especially in the Iranian Kurdistan, the leaders of the group sought refuge in the Qandil mountain region of northern Iraq.⁸⁵¹

The organization is led by Abdul-Rahman Haji-Ahmadi who has previously been a member of the PKK and is now in exile in Germany.⁸⁵² Iran considers PJAK a terrorist organization and in recent years tried to extradite its leader for the alleged crimes committed by PJAK against the security services and civilians in Iran.⁸⁵³ Iran alleges that PJAK is the latest ploy by the US and Israel to destabilize it and the region as a whole.⁸⁵⁴ A number of commentators have claimed that through PJAK the US and Israel were waging a proxy war against Iran and that it was receiving clandestine assistance from the US and Israel in order to curtail the ambitions of the Iranian regime in the region and the wider Middle East.⁸⁵⁵ However, these allegations have been vehemently denied by US officials.⁸⁵⁶ It is interesting to note that in July 2007 the PJAK leader visited the US and met with US officials to gather support for his organization's struggle against the theocratic regime in Iran.⁸⁵⁷ Although the US has not officially commented on the meeting, it has been claimed by some PJAK military leaders that their leader's meeting in Washington was with "high level" officials and that they discussed "the future of Iran."⁸⁵⁸ However, on 4 February 2009 in an apparent change of policy and a gesture of goodwill towards Iran, the US Government designated PJAK as a terrorist organization by virtue of supporting the PKK rather than on the basis of its own activities.⁸⁵⁹

⁸⁵⁰ Gunter, 'Historical Dictionary of the Kurds', *op. cit.*, p. 178.

⁸⁵¹ Zambelis, 'The Factors Behind Rebellion in Iranian Kurdistan', *op. cit.*, p. 18.

⁸⁵² Eccarius-Kelly, 'the Militant Kurds', *op. cit.*, p. 213.

⁸⁵³ Germany Rejects Iran Request for Extradition, Radio Free Europe, 09 March 2010 <http://www.rferl.org/content/Germany_Rejects_Iran_Extradition_Request/1979051.html>.

⁸⁵⁴ Entessar, 'Kurdish Politics in the Middle East', *op. cit.*, p. 205.

⁸⁵⁵ Seymour Hersh, "The Next Act: id a damaged Administration less likely to attack Iran?" The New Yorker, 27 November 2006; see also S. Ritter, 'Target Iran: the Truth about the White House's Plan for Regime Change', Nation Books, 2007, p. 196.

⁸⁵⁶ Ross Wilson, the US Ambassador to Ankara denied those allegations, 30 June 2008 <www.washingtonpost.com/wp-dyn/content/article/2007/09/12/AR2007091201133.html>.

⁸⁵⁷ 'Kurdish leader seeks help to topple the regime', Washington Times, 4 August 2007 <<http://www.washingtontimes.com/news/2007/aug/4/kurdish-leader-seeks-us-help-to-topple-regime/>>.

⁸⁵⁸ Newsweek Magazine interview with Biryar Gabar a PJAK commander cited in Entessar, 'Kurdish Politics in the Middle East', *op. cit.*, p. 205.

⁸⁵⁹ According to the US DoS on 4 February 2009, the United States 'designated the Free Life Party if Kurdistan (PJAK) for supporting the Kurdish Workers Party (PKK), a designated Foreign Terrorist Organization that has been involved in targeting of the Turkish government for more than 20 years. PJAK was created in 2004 as a splinter group of the PKK to appeal to Iranian Kurds. Operating in the border region between Iraq and Iran, PJAK is controlled by the leadership of the PKK and receive order and personnel from the main organization.'

The Iranian government has made repeated attempts to ask to extradite the PJAK leader from Germany.⁸⁶⁰

Ever since its relocation to northern Iraq, Qandil Mountains has served as a “safe haven” to the organization’s 3,000 fighters and also as a hub for launching attacks against Iran.⁸⁶¹ There they adopted the same operational tactics of the PKK and in effect came under the latter’s control. Women form 40 per cent of PJAK’s rank and file, as in the case of the PKK play a major part in every level of the organization.⁸⁶² PJAK’s operations are not comparable to the PKK mainly because of its limited number of fighters. PJAK has claimed responsibility for a number of armed operations against security forces in Iran.⁸⁶³ As a reaction to these operations carried out by PJAK, since 2007, Iranian security forces have been shelling PJAK’s positions within northern Iraq from inside Iran.⁸⁶⁴

It is worth mentioning that PJAK is alleged to be part of the Union of Communities in Kurdistan (*Koma Civakên Kurdistan*, KCK) headed by the PKK’s acting leader Murat Karayilan.⁸⁶⁵ According to the US Department of State PJAK is controlled by the PKK and has Turkish Kurds in its ranks.⁸⁶⁶ Because of the alleged association between PJAK and PKK in recent years Iran and Turkey in spite of their complex and at times acrimonious relations have carried out coordinated military operations against PJAK and PKK in Qandil Mountains.⁸⁶⁷ The determination of Iran and Turkey to combat the joint threat of the PKK and PJAK has recently been reiterated.⁸⁶⁸

US Department of State, Country Report on Terrorism 2009, August 2010, <<http://www.state.gov/documents/organization/141114.pdf>>.

⁸⁶⁰ ‘Iranian authorities demanding action against the leader of PJAK in Germany’, BBC Persian, 25 July 2011 <http://www.bbc.co.uk/persian/iran/2011/07/110725_103_pjak_salehi_moslehi.shtml?s>.

⁸⁶¹ J. Brandon, Iran’s Kurdish Threat: PJAK’, (The Jamestown Foundation) 15 June 2006 <http://www.jamestown.org/programs/gta/single/?tx_ttnews%5Btt_news%5D=805&tx_ttnews%5BbackPid%5D=181&no_cache=1>.

⁸⁶² Gunter, ‘Historical Dictionary of the Kurds’, *op. cit.*, p. 178.

⁸⁶³ ‘Iran blames ‘terrorist attack’ on Kurdish separatists’, the Christian Science Monitor, 22 September 2010 <<http://www.csmonitor.com/World/terrorism-security/2010/0922/Iran-blames-terrorist-attack-on-Kurdish-separatists>>.

⁸⁶⁴ A.L. Butters, Why is Iran shelling Iraq? 20/08/2007, Time World, 20 August 2007 <<http://www.time.com/time/world/article/0,8599,1654449,00.html>>.

⁸⁶⁵ Zaman Today, ‘Karayilan injured in Iranian operation’, 12 October 2011 <<http://www.todayzaman.com/news-259654-karayilan-injured-in-iranian-operations-report-says.html>>.

⁸⁶⁶ As well as PJAK, Jundullah a NSAG operating in Sistan& Baluchestan Province of Iran were listed as Terrorist organizations. US Department of State, Country Reports on Terrorism 2008, Chapter 5, 30 April 2009 <<http://www.state.gov/j/ct/rls/crt/2008/>>.

⁸⁶⁷ Suzan Fraser, Associated Press, ‘Turkey, Iran launch coordinated attacks on Kurds’, 5 June 2008 <www.ap.org>.

⁸⁶⁸ ‘Turkey and Iran Collaborating against Kurdish Rebels’, 21/10/2011, BBC <<http://www.bbc.co.uk/news/world-europe-15407142>>.

Chapter 3 Modern International Law, the Kurds and self-determination

3.1 Introduction

In 1945, in the aftermath of the World War II, the United Nations was established, coinciding with the rise and fall of the Mahabad Republic.⁸⁶⁹ However, the Kurds as a people were not to benefit from the new international system especially the right to self-determination enshrined in the UN Charter as a principle but not a legal right. The right of self-determination of people has been described as perhaps the most controversial and contested term in the vocabulary of international law. Self-determination in its modern form can be related to the experiences of the American, French and Bolshevik revolutions, with their emphasis on popular sovereignty. This concept was widely used by politicians and nationalists. However, in international law it had remained in embryonic form until the breaking out of the First World War at which point V.I. Lenin, the Soviet leader, and the US President Woodrow Wilson became the leading exponents of this ideal.⁸⁷⁰ The Charter neither defines “self” or “people” nor specifies the concept of “self-determination”⁸⁷¹ and who are entitled to exercise that right.⁸⁷² The legal basis of claims to self-determination in international law can be found in Articles of 1(2) and 55 and 73(b) of the United Nations Charter which make brief reference to the ‘principle of equal rights and self-determination of people’ as one of the bases for the development of friendly relations between states.⁸⁷³ These provisions have subsequently been elevated by the international community through a series of resolutions and declarations of the General Assembly of the United Nations to the point that self-determination has been described as ‘the imperative right of people’.⁸⁷⁴ In terms of application of the doctrine of self-determination Franck opines that due to its inconsistent application by the international community this right of self-determination has been

⁸⁶⁹ Allain, ‘International Law in the Middle East’, *op. cit.*, p. 28.

⁸⁷⁰ Generally see D. Raic, ‘Statehood and the Law of Self-Determination’, Martinus Nijhoff, 2002; J. Crawford, ‘The Right to Self-Determination in International Law: Its Development and Future’, in *Peoples’ Rights* P. Alston (ed.), Oxford U.P., 2001.

⁸⁷¹ Although self-determination did not feature in the text of the Dumbarton Oaks proposals for the establishment of a General International Organization (the precursor to the UN Charter), it was included at the insistence of the USSR in the UN Charter. For text see: R.B. Russell, ‘A History of the United Nations Charter’, Washington DC, The Brookings Institution, 1958, pp. 810-813.

⁸⁷² The doctrine of self-determination in international law is the right of a “people living in given territory to determine their political and legal status. Generally see A. Cassese, ‘Self-Determination of Peoples: a Legal Reappraisal’, Cambridge U.P., 1998.

⁸⁷³ Articles 1(2) and 55 of the United Nations Charter.

⁸⁷⁴ T.M. Franck, “The Emerging Right of Democratic Governance”, *AJIL*, Vol. 86, 1992, p. 53.

undermined under international law.⁸⁷⁵ In spite of its ill-defined content, the doctrine of self-determination in international law has been used in the context of decolonization.⁸⁷⁶ This culminated in the General Assembly's striking Resolution 1514 (XV) of December of 1960⁸⁷⁷, 'the Declaration on Granting of Independence to Colonial Countries and Peoples' by some referred to as the most important of the General Assembly Resolutions⁸⁷⁸, which says 'all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. It also affirms that in the decolonization process, 'any attempt at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'⁸⁷⁹

However, the object of the Declaration was not to provide a general commentary on the emerging right of self-determination, in fact, it was being used specifically in the context of freeing Afro-Asian colonies from the yoke of European colonial powers.⁸⁸⁰ The decade after the adoption of Resolution 1514 (XV) was marked by two other major developments. The first was the two International Covenants on Human Rights⁸⁸¹ and the second, the Declaration of Friendly Relations in 1970.⁸⁸² It is worth noting that the 1970 declaration on Principles of International Law Concerning Friendly Relations and Co-operation Amongst States in accordance with the Charter of the United Nations, GA Res 2625⁸⁸³, referred specifically to

⁸⁷⁵ Ibid, p. 79.

⁸⁷⁶ M.H. Halperin, *et al*, "Self-Determination in the World Order: Guidelines for US Policy", Prentice Hall & IBD, 1st ed., 1992, p. 16; see also A. Whelan, 'Self-Determination and Decolonization: Foundations for the Future' (1992) 3(4) *Irish Studies in International Affairs* 25.

⁸⁷⁷ For text see, UN Doc. A/Res/1514 (XV): <http://www.unhchr.ch/html/menu3/b/c_coloni.htm>.

⁸⁷⁸ Crawford, 'the Right to Self-Determination in International Law', *op. cit.*, p. 17.

⁸⁷⁹ UN Doc. A/Res. 1514 (XV), Art. 6.

⁸⁸⁰ This view was further reinforced by the Article 20 of the African Charter on Human Rights⁸⁸⁰ which stipulated that 'all peoples shall have the right to existence as well as the unquestionable right' to self-determination. African (Banjul) Charter on Human and Peoples Rights, adopted June 27, 1981, Organization of African Unity (OAU) Doc. CAB/LEG/67/3 rev.5, 21 *ILM* 58(1982), entered into force October 21, 1986.

⁸⁸¹ The Article 1 of both International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights in 1966, provide that:

- 1) All peoples have the right to self-determination'. Hence, they have the right to freely determine their political status and freely pursue their economic, social and cultural development.
- 2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
- 3) The States Parties to the present Covenant including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right in conformity with the provisions of the Charter of the United Nations.

⁸⁸² R. Rosenstock, "The Declaration of Principles of International law concerning Friendly Relations: A survey", 65 *AJIL*. 713 (1971).

⁸⁸³ GA. Res. 2625 XXV) UN AGOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8028 (1970).

the colonial situation.⁸⁸⁴ The 1970 Declaration went one step further in stating that states have a duty not to deprive people, who are subject to ‘colonialism’ and ‘alien subjugation, domination and exploitation’, of their right to self-determination.⁸⁸⁵ But under pressure from newly independent states the 1970 Declaration on Friendly Relations has a “claw-back” clause which limits the expression of the right to self-determination:

Nothing in the forgoing paragraphs [related to the exercising of the right of self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The UN had based its strategy on the proposition that ‘the territory of a colony or other non-self-governing territory has under the Charter a status separate and distinct from the territory of the state administering it’ and such a situation will exist until the people of that territory had exercised their right to self-determination.⁸⁸⁶

At this stage special attention has to be paid to the importance of the principle of territorial integrity, which protects the territorial framework of newly independent states and is part of the overall sovereignty of those states.⁸⁸⁷ This is the concept of freezing territorial boundaries at the moment of independence; case-law has long maintained this principle.⁸⁸⁸ Also, it has been argued that the principle of territorial integrity of states is well established through the UN Charter. For instance, Article 2(4) forbids the threat of use of force against the territorial integrity and political independence of states.⁸⁸⁹ It is worth noting that the said principle has

⁸⁸⁴ It is submitted that the broad acceptance of the Covenants by many states elevates the right of self-determination to the status of a customary norm of international law. International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights in 1966; see C.G. Berkey, “International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples”, 5 *Harv. Hum. Rts. J.* 65 1992, p. 78.

⁸⁸⁵ Allain, ‘International Law in the Middle East’, *op. cit.*, p. 29.

⁸⁸⁶ There are many other General Assembly Resolutions, which reaffirm this normative principle with regard to specific territories. See e.g. GA Res. 1755 (XVII), 1962; 2138 (XXI), 1966; 2151 (XXI), 1966; 2379 (XXIII).

⁸⁸⁷ K.H. Kaikobad, “Some Observations on the Doctrine of the Continuity and Finality of Boundaries”, 54 *BYIL*, 1983, p. 119.

⁸⁸⁸ The *Libya/ Chad* Case, Territorial Dispute, ICJ Reports, 1994, pp. 6,37; 100 ILR, p.1; The *Beagle* case, 21 RIAA, pp. 55, 88; 52 ILR, p.93, the *Dubai/Sharjah* case, 91 ILR, pp. 543, 578; On this point Shaw states: “Self-determination has also been used in conjunction with the territorial integrity in order to protect the territorial framework of the colonial period in the decolonization process and to prevent a rule permitting secession from independent states from arising.” Shaw, “International Law”, *op. cit.*, p. 256.

⁸⁸⁹ For an assessment of Self-Determination v Territorial Integrity, see L. Brilmayer, “Secession and Self-Determination: A Territorial Interpretation”, 16 *Yale JIL*, 1991, 177; J. Castellino, “Territorial Integrity and the right to Self-Determination: An Examination of the Conceptual Tools”, 33 *Brooklyn JIL* 503 2007-2008.

particularly been emphasised by developing nations.⁸⁹⁰ In regard to the international community's approach Cassese in his seminal evaluation of self-determination notes that it remained:

Silent in response to claims asserting the right of self-determination ... on behalf of ethnic groups, such as the Kurds, Armenians, and Basques, indigenous populations, such as the native peoples of Latin America, North America, Australia, and New Zealand; linguistic minorities, such as the *Québécoise*; and religious groups such as the Catholics in Northern Ireland.⁸⁹¹

As noted above, not only has the principle of self-determination been enshrined in the most important international documents and conventions but it has also been adopted by regional organizations.⁸⁹² This principle has also received favorable judicial approval in the *Namibia*⁸⁹³, *Western Sahara*⁸⁹⁴ and *East Timor*⁸⁹⁵ cases. As the above-mentioned cases illustrate the right to 'external' self-determination was to be conceived only in the process of decolonization where a people assert their right only in the three following situations, against: colonial regimes, racist *quo* apartheid regimes, or military occupying forces.⁸⁹⁶ Clearly, the external right to self-determination developed by the UN since 1945 was to rid the statist system of foreign influence from the so-called third world countries but ensuring maintenance of established frontiers.⁸⁹⁷ Therefore, in the strict positivist sense, the doctrine of self-determination in its external guise is not applicable to the Kurdish populations of Turkey, Iraq, and Iran since they are not under neither colonial or racist regimes nor under occupying forces.⁸⁹⁸ As Chaliand says:

'During international assemblies, the invocation of "the right of self-determination" is made as often as it is vague; this right is legally guaranteed, but its content is however,

⁸⁹⁰ On the face of it, in the sphere of contemporary international law territorial integrity and self-determination are two competing principles. Shaw, *Title to Territory in Africa*, Chapter 5.

⁸⁹¹ Cassese, 'Self-Determination of Peoples: a Legal Reappraisal', *op. cit.*, p. 103.

⁸⁹² See article 17 of the Charter of the Organization of American States and Art 3(3) of the OAU Charter.

⁸⁹³ ICJ Reports (1971) 16, at 31, where the International Court of Justice declared that, 'the subsequent development of international law in regard to non-self-governing territories as enshrined in the Charter of the United Nations made the principle of self-determination applicable to all of them'

⁸⁹⁴ ICJ Reports (1975) 12, at 31.

⁸⁹⁵ In regards to East Timor case the *erga omnes* character of the principle of self-determination was proclaimed as 'one of the essential principles of contemporary international law.' ICJ Reports (1995) 90, at 102.

⁸⁹⁶ Shaw, "International Law", *op. cit.*, p. 257.

⁸⁹⁷ This was achieved through the doctrine of *uti possidetis*, according to which colonial boundaries were to remain intact and upon achieving independence turn into international borders. Generally see Lalonde, S., *Determining Boundaries in a Conflicted World, The Role of Uti Possidetis*, McGill-Queen's U.P., 1st ed., 2004.

⁸⁹⁸ Allain, 'International Law in the Middle East', *op. cit.*, p. 29.

non-existent and it is known that it depends more often than not to relations of powers as it is measured by force of arms.’⁸⁹⁹

It is worth noting that beyond the process of decolonization the said doctrine has evolved into ‘internal’ self-determination.⁹⁰⁰ In the light of this development, the focus of self-determination was diverted from purely decolonization process into an internal human rights issue concerning existing independent states.⁹⁰¹ In other words the principle of self-determination attained a new application in terms of collective human rights.⁹⁰² Therefore, self-determination applies beyond the process of decolonization albeit under a different context, it provides the overall framework for the consideration of the principles relating to democratic governance.⁹⁰³ In the post-1945 era, the Cold War had a profound effect on the exercise of the right to self-determination, as many former colonies in Africa and Asia were achieving their independence instead the Kurds were ‘doomed, in large part, to remain within a system bent on maintaining territorial integrity of states.’⁹⁰⁴ As a result, yet again due to international intervention in favor of Turkey and Iran (by the US & the West) and Iraq (supported by the USSR) usurped the aspirations of the Kurds in the Middle East.⁹⁰⁵ So it comes as no surprise that the Cold War era marked more continuous repression and forced assimilation of the Kurds into the unitary systems of Turkey, Iraq and Iran, ultimately resulting in the Kurds taking up arms against the sovereign states in question.⁹⁰⁶

⁸⁹⁹ Gerard Chaliand, *‘Les Kurdes et le Kurdistan’*, cited in *ibid*, p. 17.

⁹⁰⁰ The Helsinki Accord marked the next significant stage in the development of the principle of self-determination in the following years to post-colonial era in 1975. The Helsinki Final Act also refers to the principle of equal rights and self-determination. It goes on to say that ‘all peoples have the right, in full freedom to determine when and as they wish, their internal and external political status, without external interference’. This Conference was participated by 35 European states from both NATO and Warsaw pact countries under the pretext of Security and Cooperation in Europe convened on July 3 1973 and concluded there in August 1 1975.

⁹⁰¹ See also the Charter of Paris for a New Europe was created by the Heads of State and Governments during the Conference on Security and Cooperation in Europe in 1990. It declared that the signatories:

‘Reaffirm the equal rights of Peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of states.’ <<http://www.osce.org/mc/39516>>.

⁹⁰² The UN Human Rights Committee established under the International Covenant on Civil and Political rights 1966 reinforced this view. This Committee in its general comment on self-determination in 1984 elaborated that the right to this principle was ‘an essential condition for the effective guarantee and observance of individual human rights’. Human Rights Committee, General Comment No. 12: the Right to Self-determination of Peoples (Article 1): 13/03/1984.

⁹⁰³ See T. Franck, ‘The emerging Right to Democratic Governance’, *AJIL* 86 1992, p.46.

⁹⁰⁴ Allain, ‘International Law in the Middle East’, *op. cit.*, p. 30.

⁹⁰⁵ Charountaki, ‘The Kurds & US Foreign Policy’, *op. cit.*, p. 42.

⁹⁰⁶ Allain, ‘International Law in the Middle East’, *op. cit.*, p. 31.

3.2 The rise of non-state actors in the post-1945 era

One of the most distinguishing aspects of contemporary international law since the end of the World War II has been the emergence of wide variety of participants which include sovereign states as well as international organizations, regional organizations, non-governmental organizations, public companies, private companies and individuals.⁹⁰⁷ Moreover, the twentieth and twenty-first Centuries heralded the rise of non-state actors whose activities are transnational or have transnational affect.⁹⁰⁸ Consequently, this has resulted in non-state actors becoming more prominent in international relations.⁹⁰⁹ On this point Green notes:

Non-state actors play a crucial role in today's globally interdependent world. The actions of international organizations, multinational corporations, terrorists groups, non-governmental organizations (NGOs), minority peoples and individual persons now permeate all areas of international life – from economics and trade to peace and security, and from human rights to the regulation of the natural environment.⁹¹⁰

This view is very much supported by some of the most prominent scholars of international law that point to the changing nature of global power structure, international law and specifically the decline of the sovereign state and the rise of non-state actors.⁹¹¹ Many observers such as Martin Van Creveld acknowledge the decline of the state as one of the most important institutions since the middle of the seventeenth century as one of the main reasons for this trend.⁹¹² In the first decade of the twenty-first century we find ourselves in a global environment where a significant number of the nominal states of the world are incapable of exercising anything approaching plenary power within their borders. They are commonly described as failed states.⁹¹³ Reisman contributes the very formation and existence of such

⁹⁰⁷ Shaw, 'International Law', *op. cit.*, p. 196.

⁹⁰⁸ P. Alston (ed.), 'Non-State Actors and Human Rights', Oxford U.P., 2005, p. 74.

⁹⁰⁹ W.G. Grewe, 'The Epochs of International Law', translated by Michael Byers, Walter de Gruyter, Revised edition, 2000, p. 709.

⁹¹⁰ F. Green, 'Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality', 9 *Melb. JIL* 47 2008, p. 49.

⁹¹¹ See eg. J-M. Guéhenno, 'The End of Nation-State', (translated by Victoria Elliot), Minnesota U.P., 1995; J. Mathews, 'Power Shift: The Rise of Global Civil Society' *Foreign Affairs*, vol. 76, 1997, pp. 50-66; A-M. Slaughter, 'A New World Order', Princeton U.P., 2004; C. Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' (1993) 4 *EJIL* 447; O. Schachter, 'The Decline of the Nation-State and its Implication for International Law', (1998) 36 *Columbia JTL* 7.

⁹¹² M. Van Creveld, 'The Rise and Decline of the State', Cambridge U.P., 1st ed., 1999.

⁹¹³ A state could be said to be a "failed state" if it cannot maintain a monopoly on the legitimate use of force within its borders; see S. Chesterman (ed.), 'Making States Work: State Failure and the Crisis of Governance',

states to the fact that they are treated as nation-states because of the tacit or expressed agreement or the coincidental disinterest of the effective global elite.⁹¹⁴

Moreover, globalization has had the greatest impact on the structure of international relations and international law and as a result many experts are convinced that this body of law is going through a rapid period of transformation.⁹¹⁵ Undoubtedly, globalization has also precipitated the decline of the nation-state in the twentieth century and the rise of non-state actors as subjects of international law.⁹¹⁶ The fact that entities other than states can be subjects of international law is not a universally accepted idea and remains a very controversial issue.⁹¹⁷ Therefore, it could be concluded that although there are more non-state actors prominent on the global plain but still it will be sovereign states sitting at the negotiating table presiding over crucial decision-making process in international relations. Howard notes:

It is not clear what alternative creators and guarantors of peaceful order could or would take place of the state in a wholly globalized world. The state still remains the effective mechanism through which people can govern themselves ... The erosion of state authority is thus likely not to strengthen world order but to weaken it, since states become incapable of fulfilling the international obligations on which that order depends.⁹¹⁸

In spite of the emergence of non-state actors, there is no question that the most important decisions regarding any aspects of international relations and international law will ultimately be made by the community of sovereign states.⁹¹⁹

United Nations U.P., 1st ed., 2005; R. Rotberg, 'When States Failed: Causes and Consequences', Princeton U.P., 1st ed., 2004.

⁹¹⁴ W.M. Reisman, 'Private Armies in a Global War System: Prologue to Decision' in 'Law and Civil War in the Modern world', John Norton Moore (ed.), The Johns Hopkins U.P., 1st ed., 1974, pp. 258-259.

⁹¹⁵ See P. Schiff-Berman, (ed.), 'The Globalization of International Law', Ashgate Publishing, 1st ed., 2005.

⁹¹⁶ R. Hoffman, 'Non-State Actors as the New Subjects of International Law', Berlin 1999, p. 13.

⁹¹⁷ See H. Bull, 'Anarchical Society: A Study of Order in World Politics', Palgrave, 3rd ed., 2002; Hersch Lauterpacht, 'The Subjects of the Law of Nations', *LQR*, 63 (1947), p. 444; Rosalyn Higgins, 'The Development of International law Through the Political Organs of the United nations, Oxford U.P., 1963.

⁹¹⁸ M. Howard, 'the invention of Peace: Reflections on War and International Relations', Yale U.P., 2001, pp. 103-104.

⁹¹⁹ Generally see J.H. Jackson, 'Sovereignty-Modern: a New Approach to an Outdated Concept', *AJIL*, 2003 782.

3.3 The rise of NSAGs globally, guerrilla warfare and international law

The second half of the twentieth century has been described as the era of guerrilla warfare.⁹²⁰ It is fair to say that the concept of armed conflict evolved from predominantly inter-state in nature in the first half of the twentieth century to being increasingly pre-occupied with an intrastate character in the second half of the twentieth Century.⁹²¹ In these internal conflicts NSAGs in the shape of rebels, insurgents and militias which operate outside the control of any states not only seriously threaten the security of populations within states but also imperil the security of millions beyond their borders.⁹²²

Since the end of the Second World War, ideology, revolution and counter-revolution together have been the most potent causes of conflict in the shape of internal armed conflicts in the world.⁹²³ Various studies that track armed conflicts confirm that in the post-1945 period the majority of those conflicts were of internal rather than between sovereign nations.⁹²⁴ The incidences of inter-state wars have declined dramatically over the past half a century.⁹²⁵ In this regard Derriennic opines that ‘if civil wars seem to be the most deadly form of political violence, it is certainly not because of the new intensity of the phenomenon but more probably because of the relative decline in another form of organized violence, inter-state war’.⁹²⁶ After the adoption of the UN Charter in 1945, many governments and jurists abandoned the use of the term “war”.⁹²⁷ It has been argued that another contributory factor to the demise of inter-state war was the outlawry of war as a national instrument through Article 2(4) of the UN Charter.⁹²⁸ War as an instrument of national policy was abolished.⁹²⁹ This

⁹²⁰ K. Suter, ‘An International Law of Guerrilla Warfare’, Frances Pinter Publishers, 1984, p. 1.

⁹²¹ A. Cassese, ‘International Law’, Oxford U.P., 2nd ed., 2004, p. 124.

⁹²² See D. Petrasek, ‘Ends and Means: Human Rights Approaches to Armed Groups 3’ (2000); C. Holmqvist, ‘Engaging Non-State Actors in Post-Conflict Settings’, in ‘Security Governance and Post-Conflict Peace-building’, A. Bryden H. Hanggi (eds.), 2005.

⁹²³ G. Best, ‘War and Law: Since 1945’, Oxford University Press, 1st ed., 1994, p.213; According to Best to label it simply ‘revolution’ hardly does justice to the contemporary complexity of its texture; see also H. Arendt, ‘On Revolution’, Penguin Books, 1990, especially ‘War and Revolution’, pp. 11-20.

⁹²⁴ H.K. Tilleman, ‘International Conflict since 1945: A Bibliographic Handbook of Wars and Military Interventions’, Boulder, Co: Westview, 1st ed., 1991.

⁹²⁵ C. Greenwood, ‘The Concept of War in Modern International Law’, 36 *ICLQ*, 1987, 293-294; L. Kotzsch, ‘The Concept of War in Contemporary History and International Law’, Geneva, 1956, pp. 86 and 89.

⁹²⁶ J-P. Derriennic, ‘*Les Guerres, Civiles, Presses de Sciences Pô*’, Paris, 2001, cited in Jean-Jacques Fresard, ‘The Roots of Behavior in War: A Survey of the Literature’, ICRC, October 2004, p. 38-9.

⁹²⁷ See E. Lauterpacht, ‘The Legal Irrelevance of the ‘State of War’ (1968) 62 *Proceedings of the American Society of International Law* 68; R.R. Baxter, ‘The Legal Consequences of the Unlawful Use of Force Under the Charter’ (1968) 62 *Proceedings of the American Society of International Law* 68; Lord McNair & A.D. Watts, ‘The Legal Effects of War’, New York: Cambridge U.P., 4th ed., 1966.

⁹²⁸ The said Article proclaims: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations”. Charter of the United Nations, 1945, 9 *Int. Leg.* 327, 332.

even prompted many international jurists such as Quincy Wright to rush to claim the abolition of war as an institution of international law in the nineteenth century positivist sense. He states that ‘war in the legal sense has been in large measure “outlawed”; that is, the international law conventionally accepted by most states no longer recognizes that large-scale hostilities may constitute a “state of war” in which belligerents are legally equal’.⁹³⁰

In this regard, Dinstein opines that by omitting the term ‘war’ the drafters of the said Article 2(4) abolished the use or threat of force in international relations.⁹³¹ But significantly intra-state clashes were therefore beyond the reach of the Charters provisions. This reflected the humanitarian revolution which marked a fundamental shift in the very nature and purpose of the rules governing the prosecution of armed conflict.⁹³² The UN regime however spelt out two exceptional circumstances in which resort to use of force by states would be allowed. One was in case of self-defence a sovereign state was permitted to use proportionate force in order to protect its population and sovereignty against outside aggression under Article 51 of the UN Charter⁹³³ and the other through collective law-enforcement action by the UN Security Council through the Chapter VII of the UN Charter.⁹³⁴ These two exceptions however were only strictly related to states and not in relation to other entities such as NSAGs.⁹³⁵

Not only war as an institution in international relations was not abolished but simply the nature of armed conflict went through a dramatic shift of paradigm from predominantly inter-state armed conflicts between sovereign states in Europe to intra-state conflicts limited mainly to regions outside Western Europe.⁹³⁶ It is significant to note that since the Korean War in 1954, there has been no conventional war between major powers, and the incidence of

⁹²⁹ *Yearbook of the International Law Commission*, 1949, UN Doc.A/CN.4/SER.A/1949, p. 281; see also Neff, ‘War and the Law of Nations: a General History’, *op. cit.*, see especially chapter 9, entitles: ‘Farewell to war’, pp. 314-356. See also as a pre-cursor to this the Kellogg-Briand Pact in 1928, by Article 1, state parties “condemned war” and agreed to “renounce it as an instrument of national policy in their relations with one another”; General Treaty for Renunciation of War as an instrument of National Policy, Aug. 27, 1928, art. 1, 46 stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

⁹³⁰ Lauterpacht, H., ‘the Limits of the Operation of the Law of War’, 30 *BYIL* (1953) 206, p. 240; Wright, Q., ‘The Outlawry of War and the Law of war’ 47 *AJIL* 356, 1953, p. 365.

⁹³¹ Y. Dinstein, ‘War, Aggression and Self-Defence’, Cambridge U.P., 2011, p. 85.

⁹³² S.C. Neff, ‘War and the Law of Nations: a General History’, Cambridge U.P., 2006, p. 340.

⁹³³ O. Schachter, ‘International law in Theory or Practice’, Martinus Nijhoff Publishers, 1991, p.401.

⁹³⁴ See E. De Wet, ‘The Chapter VII Powers and the United Nations Security Council’, Hart Publishing, 2004; see also V. Gowlland-Debbas, ‘Collective Security Revisited in Light of the Flurry over UN Reform: An International Law Perspective’, in ‘Conflicts, Security and Cooperation: *Liber Amicorum* Victor-Yves Ghebali’, V. Chetail (ed.), Bruylant: Bruxelles, 2007, pp. 251-278.

⁹³⁵ Greenwood is of the opinion that this is supported by state practice which supports the thesis that war as a legal condition is incompatible with the UN Charter, Greenwood, ‘the Concept of War in Modern International Law’, *op. cit.*, p. 290.

⁹³⁶ M. Van Creveld, ‘The Transformation of War’, Maxwell Macmillan International, 1991, p. 20.

inter-state wars have declined dramatically over the past half a century.⁹³⁷ Indeed, this trend left the international community in no doubt that the issue of internal armed conflict had to be addressed, albeit, through a somewhat minimalist manner by the adaption of Article 3 to the four Geneva Conventions of 1949. The said Conventions and its two Additional Protocols of 1977 which specifically deal with internal armed conflict will be discussed in greater detail below.

3.4 NSAGs, the Cold War & proxy wars

As noted above, as the specter of civil war enters the picture of post-1945 armed conflict, any optimism for eradication of war as a phenomenon was dashed. Such idealism was short lived and was shattered by the outbreak of the Cold War between the United States and the Soviet Union and its resultant ideological confrontations. To put it simply, the ideological contest between communism and free market capitalism. This clash of ideologies continued until the collapse of the Soviet empire in 1990.⁹³⁸ Hence, the Cold War's ideological conflicts subsequently played a major part in proliferation of many NSAGs engaged in proxy-wars on behalf of the super-powers challenging the legitimacy of the government of states (mostly of newly independent states) who were hosting them.⁹³⁹ Indeed, the armed conflicts in which Kurdish NSAGs were involved in were also a result of this ideological dichotomy in the shape of proxy wars.⁹⁴⁰ According to Neff, 'there was an increasing view, strongly undergirded by Cold-War consideration, that modern civil wars, much more than those in the past, often had repercussions that extended well beyond the boundaries of the state in question.'⁹⁴¹

Inevitably, there was an upward trend in internal armed conflicts during the Cold War era.⁹⁴² With the advent of the Cold War and the proliferation of nuclear weaponry put an end to inter-state conflicts and direct form of aggression involving major powers, resulted in, many less transparent internationalized armed conflict which were on the surface of internal nature

⁹³⁷ L. Levy, 'War in the Modern Great Power System', Lexington: Kentucky U.P., 1st ed., 1983, pp.148-149; see also B. Lacina, N.P. Gleditsch & B. Russett, 'The Declining Risk of Death in Battle' *International Studies Quarterly* (2006) 50, 673-680.

⁹³⁸ C.O. Quaye, 'Liberation Struggle in International Law', Temple University Press, 1991, p. 44.

⁹³⁹ See C. Loverman, 'Assessing the Phenomenon of Proxy Intervention', *Journal of Conflict, Security and Development*, Vol. 2, No. 3, December 2002, pp. 29-40; B.V.A. Röling, 'The Legal Status of Rebels and Rebellion', 13 *Journal of Peace Research*, 1976, pp. 149-151.

⁹⁴⁰ One of the best examples of a "proxy war" prior to the Second World War was the Spanish Civil War which took place between mid-1936 and early 1939, was the bloodiest in the history of present-day Europe; R. A. Falk, 'Janus Tormented: The International Law of Internal War, in International Aspects of Civil Strife', *op. cit.*

⁹⁴¹ Neff, 'War and the Law of Nations: a General History', *op. cit.*, p. 358.

⁹⁴² R. Smith, 'The Utility of Force: The art of War in the Modern World', *op. cit.*, p. 4.

but in reality were ‘proxy wars’.⁹⁴³ These conflicts were taking place in the territory of a single state with the covert intervention of a foreign state, mainly the two superpowers.⁹⁴⁴ In other words, the existence of nuclear weapons acted as a deterrent and prevented the super powers to engage in direct confrontation in those conflicts.⁹⁴⁵ The repercussions of this ideological contrast in regards to armed conflicts were very far reaching.⁹⁴⁶ As a consequence, the concept of “proxy war” became a common feature of the second half of the twentieth century in international and non-international warfare.⁹⁴⁷

3.5 The classical approach to NSAGs & armed conflict in international law

3.5.1 The legal development

In order to follow this important element of international law especially in relation to NSAGs and internal armed conflict, the following historical analysis will act as a catalyst to promote appreciation of the development and values of the laws of war or in its modern guise International Humanitarian Law (IHL). All of the revolts in the first half of the twentieth century involving traditional Kurdish NSAGs were considered purely as civil wars in international law. This was so in the light of the fact that at the time the internal affairs of a sovereign state were of no concern of international law.

The laws of war were the first part of international law to be codified which had its basis in human history.⁹⁴⁸ Until the mid-nineteenth century the laws of war remained customary in nature, ‘recognised because they had existed since time immemorial and because they

⁹⁴³ J. Gross-Stein, ‘Proxy wars: How superpowers end them: the diplomacy of war termination in the Middle East’, 35 *International Law Journal*, 478 1979-1980; for East-West Proxy Wars see generally R. J. Bloomfield (ed.), ‘Regional Conflict and U.S. Policy: Angola and Mozambique’, Reference Publications, 1988; H.A. Kitchen (ed.), ‘Angola, Mozambique, and the West’, Greenwood Publishing, 1987.

⁹⁴⁴ This was mainly taking place in the continent of Africa; see S.J. Climbala, ‘Politics of Warfare’, Penn State Press, 2004, p. 51; see also R. Van Dijk (ed.), ‘Encyclopedia of the Cold War’, Taylor & Francis, 2008, p. 146.

⁹⁴⁵ Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 2.

⁹⁴⁶ McWhinney perceptively describes the character of International Law in the bipolar Cold War setup, E. McWhinney, ‘The United Nations and a New World Order for a New Millenium: Self-Determination, State Succession, and International Humanitarian Intervention’, Martinus Nijhoff Publishers, 2000, p. 6.

⁹⁴⁷ Generally see S.L. Brill, ‘The World Deployed: US and Soviet Military Intervention and Proxy Wars in the Third World since 1945’, in R.W. Clawson (ed.), ‘East-West Rivalry in the Third World’, Wilmington, 1986, pp. 77-101.

⁹⁴⁸ D. Schindler & J. Toman, ‘The Laws of Armed Conflicts’, *op. cit.*, p. VII; also see M.R. Rwelamira, ‘The Significance and Contribution of the Protocols to the Geneva Conventions of August 1949’, pp. 227-236, in C. Swinarski (ed.), ‘Studies and Essays on International Humanitarian Law and Red Cross Principles’, In Honor of Jean Picet, ICRC, Geneva, 1984, p. 8

corresponded to the demands of civilization.⁹⁴⁹ What existed at the time was more in custom, in broad principles, in military manuals and the national laws and religious teachings.⁹⁵⁰ Although the laws regulating the conduct of hostilities were recognized in many early cultures, the theories of the laws of armed conflict are essentially “Eurocentric” in nature.⁹⁵¹ ‘In his seminal work ‘*De jure belli ac pacis*’, published in 1625, Hugo Grotius, the father of modern international law, signaled the existing bounds to the conduct of war.⁹⁵² In it he considered what principles governed or should govern the behavior of nations towards each other. However, the text was concerned as much with the causes as to the conduct of war; spelt out in a convenient technical language of *jus ad bellum* and *jus in bello*. Not only was Grotius concerned with the question of how men should behave in the heat of the battle, but he also dealt seriously with the question whether they should be fighting at all in the first place. In other words for Grotius, the rights and wrongs of engaging in war at all was as much a concern as how the war should be conducted.⁹⁵³

It was only during the age of the enlightenment in the seventeenth century that something recognizable like the modern international law took shape, in that it found its way into the common discourse of the ruling elites of the whole European state-system.⁹⁵⁴ As a result of the creation of a modern European state system in the seventeenth century, the laws of war were the first branch of international law to be developed in any depth.⁹⁵⁵ Indeed it has been noted that ‘more humane rules were able to flourish in the period of limited wars from 1648 to 1792’.⁹⁵⁶ But it was during the middle of nineteenth century to the first decade of the

⁹⁴⁹ See G.P. Noone, ‘The History and Evolution of the Law of War Prior to the WW II’, 47 *Naval Law Rev.* 176 2000; H.S. Levie, ‘History of the Law on Land’, *IRRC* No. 838, pp. 339-350.

⁹⁵⁰ See C.F. Amerasinghe, ‘History and Sources of the Law of War’, 16 *Sri Lanka Journal of International Law* 263 2004.

⁹⁵¹ D. Fleck, ‘Humanitarian Law in Armed Conflict’, 1st ed., Oxford U.P., 1995

⁹⁵² D. Fleck (ed.), ‘The Handbook of Humanitarian Law in Armed Conflict’, Oxford U.P., 2nd ed., 2008, p. 16; Hugo Grotius, ‘The Laws of War and Peace (*De Jure belli ac Pacis*)’, New Translation, Published for classic club by W. J. Black (1949).

⁹⁵³ It is also crucial to remember that Grotius had no doubt that waging war could be necessary and virtuous as long as it was conducted by the fighting men whose business it was to bring the war to its military conclusion without inflicting undue harm to non-combatants; Best, G., ‘War and Law since 1945’, Oxford U.P., 1st ed., 1994, p. 28-29

⁹⁵⁴ It is also worth noting that it was only during the age of the enlightenment that something recognizable like the modern international law took shape, in that it found its way into the common discourse of the ruling elites of the whole European state-system; Hoffman, S., and Fidler, P., ‘Rousseau on International Relations’, Oxford U.P., 1st ed., 1991; Rousseau, J.J., ‘*Le Contrat Social*’, English Translation by Maurice Cranston, Penguin Classics, 1968, Book 1, Chapter 4.

⁹⁵⁵ S.E. Edmunds, ‘The Laws of War: Their Rise in the Nineteenth Century and Their Collapse in the Twentieth’, 15 *Va. L. Rev.* 321 1928-29

⁹⁵⁶ A.V.P. Roger, ‘Law on the Battlefield’, Manchester U.P., 2nd ed., 2004, p. 1.

twentieth century that the laws of war were partially codified.⁹⁵⁷ Multiplicity of factors led to their restatement and development in the second half of 19th century.⁹⁵⁸

The development of the laws of war in the second half of the nineteenth century was brought about mainly because of an era of great belief in human progress in general.⁹⁵⁹ This also heralded the birth of an era of multilateral treaties, setting out principles in this area of international law for states to follow.⁹⁶⁰ Yet, ironically the greatest contribution to the laws of armed conflict was made by a Prussian expatriate, Francis Lieber, who was given the task of regulating the conduct of hostilities by the Confederate army in the American Civil War.⁹⁶¹ The Lieber Code and the original Geneva Conventions in 1864 heralded the era of “civilized” warfare between “civilized” sovereign states.⁹⁶² The St. Petersburg Declaration of 1868 played an instrumental role in the development of the laws of war. The Declaration of St Petersburg provided an impetus for the international community to embark upon the adoption of further declarations of a similar nature at the two Hague conferences of 1899 and 1907.⁹⁶³ Nevertheless, this universal aspiration came to an abrupt end by the concept of total war and the advent of more destructive weaponry with the outbreak of the First World War in 1914.⁹⁶⁴ In the aftermath of the Great War, the international community turned its attention more to *jus ad bellum* restrictions rather than the development of the laws of war through instruments such as the Covenant of the League of Nations (1919), and the Kellogg-Briand Pact (1928), which condemned recourse to war as a solution for international disputes.⁹⁶⁵ In the intervening years between the two World Wars and as a reaction to the First World War, the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field was adopted.⁹⁶⁶ Hitherto the international community had only been specifically

⁹⁵⁷ See M. Howard, ‘War in European History’, Oxford U.P., 2001.

⁹⁵⁸ See e.g. L. Green, ‘The Contemporary Law of Armed Conflict’, Manchester U.P., 3rd ed., 2008, pp. 26-65.

⁹⁵⁹ C. Coker, ‘War and the 20th Century: A Study of War and Modern Consciousness’, Michigan U.P., 1994, p. 5.

⁹⁶⁰ The most important aspect of this period was the passion the international community developed for codification of rules and regulations; R.P. Dhokalia, ‘Codification of Public International Law’, Manchester U.P., 1970, p. 85.

⁹⁶¹ See Carnahan, B. M., ‘Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity’, 92 *AJIL* 213 1998, at 214; Frank Friedel, Francis Lieber: Nineteenth Century Liberal, Baton Rouge: Louisiana U.P., 1st ed., 1947, pp. 408-9.

⁹⁶² L. Reydam, ‘*A la guerre comme a la guerre*: patterns of armed conflict, humanitarian law response and new challenges’, *IRRC*, vol. 88, No. 864 December 2006.

⁹⁶³ With regard to the importance of the Hague Regulations of 1907 both the Nuremberg International Military Tribunal in 1946, and the International Military Tribunal for the Far East in 1948, regarded them as declaratory of the laws and customs of war recognised by all civilized nations; Best, ‘War and Law since 1945’, p. 42.

⁹⁶⁴ Roger, ‘Law on the Battlefield’, *op. cit.*, p. 1.

⁹⁶⁵ Reydam, ‘*A la guerre comme a la guerre*: patterns of armed conflict, *op. cit.*, p. 736.

⁹⁶⁶ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (27 July, 1929), 47 Stat. 2074, 118 L.N.T.S. 303. The 1929 Convention replaces a previous update of the 1864

concerned with inter-state wars between sovereign states. The abovementioned instruments were almost entirely concerned with international armed conflicts, much of which was subsequently revised and refined through the Geneva Conventions of 1949 and its additional Protocol of 1977. Therefore, the law of war was paradigmatically inter-state law and not applicable to internal armed conflicts in the nineteenth as well as the early twentieth centuries. Some states may have observed them through the doctrine of recognition of belligerency but were mostly done out of self-interest and practical purposes, rather than adhering to international law.⁹⁶⁷ However in the aftermath of the Second World War, civil wars achieved a more prominent place on the international agenda and it is here that the laws of war have been described at their weakest.⁹⁶⁸ But the modern approach to ‘internal armed conflict’ is contained in common Article 3 of the Geneva Convention 1949 supplemented by the Additional Protocol II of 1977.⁹⁶⁹ This has been described as one of the most significant expansions of the laws of war in the realm of civil war in the second part of the twentieth century.⁹⁷⁰ The law of war which evolved into International Humanitarian Law is the best example of the humanizing wave that swept through Public International Law after the establishment of the United Nations in 1945. The apparent paradox besetting the Law of War/IHL throughout its history could be explained albeit in simplified terms between those who call for it and those who formulate and have to implement it. Lauterpacht, the foremost international jurist of his time notes:

We shall utterly fail to understand the true character of the law of war unless we are to realize that its purpose is almost entirely humanitarian in the literal sense of the word, namely to prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle and passion. This, and not the regulation and direction of hostilities, is its essential purpose.⁹⁷¹

In contrast to rules related to international armed conflict, the legal rules concerning internal armed conflict are of relatively new in origin. Traditionally, state-centric international law,

Convention adopted in 1906 (Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, (Aug, 22, 1864), 18 *Martens Nouveau Recueil* (ser. 1).

⁹⁶⁷ Moir, L., ‘The Law of Internal Armed Conflict’, 1st ed., Cambridge U.P., 2002, at 17

⁹⁶⁸ This was inevitable because in that period most of the conflicts around the globe were taking place within states as opposed to between states; i.e. From inter-state to intra-state; Greenwood, C., ‘International Humanitarian Law (Laws of War)’ in ‘The Centennial of the First International Peace Conference: Reports and Conclusions’ edited by Frits Kalshoven, Kluwer Law International, 1st ed., 2000, p.226

⁹⁶⁹ There are also a number of other treaties which also apply to internal armed conflict; see the Hague Convention for the protection of Cultural Property, 1954, Art. 19, the Amended Protocol II to the Conventional Weapons Convention, the Chemical Weapon Convention, 1993 and the Mines Convention, 1997.

⁹⁷⁰ For a general survey see Moir, op. cit.

⁹⁷¹ H. Lauterpacht, Elihu. Lauterpacht (ed.), ‘International Law, V. 5, Disputes, War and Neutrality, parts IX-XIV: Being the Collected Papers of Hersch Lauterpacht’, Cambridge U.P., 2004, p. 586.

largely ignored NSAGs and internal armed conflicts and such issues were treated as *prima facie* as domestic affairs of sovereign states.⁹⁷² The laws of war were not automatically applicable to internal armed conflict even as way back as the nineteenth and early twentieth centuries internal conflicts and uprisings were believed to be purely internal matters of sovereign states.⁹⁷³ Some have even suggested that before a civil conflict could be considered as true war, a crucial conceptual step was necessary to be taken to somehow place insurgents on a legal par with the government that they were rebelling against, at least in matters relating to the conflict itself.⁹⁷⁴ In order to understand how the international community has fashioned its approach towards internal armed conflict, a brief historical background is provided here. As stated above, international law has long acknowledged a distinction between international and internal armed conflict. This dichotomy is based upon the core legal principle of state sovereignty which has been the cornerstone of international order since the Peace Treaty of Westphalia in 1648.⁹⁷⁵ In western thoughts, there has been a long tradition of regarding civil conflicts as fundamentally distinct from true war in the sixteenth to the eighteenth century in which rebels were without any rights.⁹⁷⁶ The concept of state sovereignty as it emerged in the sixteenth century, determined that political power rested only with the sovereign states.⁹⁷⁷

However, if the intensity of the conflict were to reach a high level of severity, the question of regulation by international law arises, in which case the relevant threshold being characterized and identified by the concept of recognition of belligerency.⁹⁷⁸ In other words, the only condition that members of NSAGs were to be recognized as lawful combatants was to be recognized either by the central governments they were fighting at or other states,

⁹⁷² For example see T. Baty & J.H. Morgan, 'War: Its Conduct and legal Results', Murray, 1915, p. 289 and W.L. Walker & F.T. Grey, 'Pitt Cobbett's Leading Cases on International Law', 5th ed., Sweet and Maxwell, 1937, vol. II, p.6.

⁹⁷³ G.I.A.D. Draper, 'Implementation and Enforcement of Geneva conventions', 1 *Receuil des cours* 1979 III, p. 26.

⁹⁷⁴ Neff, 'War and the Laws of nations: A General Story', *op. cit.*, p. 251.

⁹⁷⁵ L. Gross, 'The Peace of Westphalia 1648-1948' 42 *AJIL*, 1948, p. 20; Shaw, 'International Law', *op. cit.*, p. 26.

⁹⁷⁶ Gentili felt that insurgents and rebels should not be accorded any rights or status because, in rebelling against the state, such rebels had 'voluntarily withdrawn from the human community' and, as such had abdicated the rights afforded by the human community.; see the Three Books on the Law of War (Classics of International Law, Vol 16, Clarendon, Oxford, 1933) Book 1, Chapter IV at 22-25; Ayala Felt that rebels committed an act comparable to heresy, and should be treated accordingly (Three Books on the Law of War and on the Duties connected with War and Military Discipline, Book 1, Chapter II, Classics of International Law, Carnegie Institute, Washington DC, 1912 at 16; Vattel argued that a sovereign need not abide by the rules of war when dealing with a rebellion, though he did state that those with a 'just cause' to rebel should be treated with mercy; see the Law of Nations and the Principle of Natural Law at 25.

⁹⁷⁷ This was also known as "the Act of State Doctrine" which persisted up till the end of the WW II and the creation of the United Nations; see also *Underhill v. Hernandez*, 168 U.S. 250 (1897) in which the U.S. Supreme Court held that: 'Every sovereign state is bound to respect the independence of every other sovereign, and the court of one state will not sit in judgment on the acts of another government done within its border.'

⁹⁷⁸ Moir, 'Towards the Unification of International Humanitarian Law?' *op. cit.*, p. 109.

especially regional and world powers. During the nineteenth century civil war was given a different legal perspective into something resembling the mainstream of legal analysis, mainly because of the crumbling of older conceptions of legitimacy and realization by many peoples in that period for their right to self-determination.⁹⁷⁹

Furthermore, in the nineteenth century a body of law on the recognition of belligerency was devised by the international community to deal with a new phenomenon called 'insurgency'.⁹⁸⁰ This attitude emerged in European law and practice manifesting itself through the recognition that insurgent forces could be regarded as *de facto* entities as long as they met certain conditions namely; control of a part of the territory of the host state as well as discharging of the governmental functions; carrying out their military operation according to the laws of war; and circumstances that make it necessary for third states to recognition the belligerency.⁹⁸¹

Thus under one condition the laws of war were applicable to internal armed conflicts in the case of recognition of belligerency. It depended very much on the government facing a rebellion on its territory and if that government was prepared to unequivocally declare its intention to observe the laws of war to the rebels.⁹⁸² But as long as the onus of recognition of belligerency was firmly upon the central government, it had very little chance of being granted.⁹⁸³ Nevertheless in traditional international law, an armed and violent challenge

⁹⁷⁹ On this point, Abi-Saab states that in that period a dramatic change in international context mainly due to stabilization of the global balance of power and the rise of positivist doctrine of the states both in municipal and international law led to crystallization of the traditional separation of internal and international wars, however, he points to the fact that the legal dichotomy between internal and international conflict was not observed as rigorously in practice, he notes: "one can cite numerous instances, both before, and particularly after Napoleonic wars, of intervention by major European powers against democratic uprisings in Europe, not to speak of their increasing interest in conflicts arising in different parts of the Ottoman Empire, and in the extra-European spheres of influence as a prelude to their formal colonization; or of the intervention of the United States in the frequent internal upheavals in Latin America"; G. Abi-Saab, 'Conflicts of a Non-international Character', in 'International Dimensions of Humanitarian Law', UNESCO, Martinus Nijhoff Publishers, 1988, p. 218 for historical background see C. Finkel, 'Osman's Dream: the story of the Ottoman Empire', John Murray Publishers, 2006.

⁹⁸⁰ The genesis of this doctrine could be traced to the Islamic law which took a long step in that direction in the Middle Ages, with its distinction between *Bughat* and 'ordinary criminals – with *Bughat* referring to persons who fought for some kind of doctrine or higher cause than mere personal enrichment; Generally see Marcel Boisard, 'On the probable influence of Islam on western public and international law', *International Journal of Middle East Studies*, Vol. 11, 1980, pp. 429-50; Majid Khaduri, 'War and Peace in the Law of Islam', The Law Book Exchange Ltd., 1st ed., 2006, pp. 65-66, 74-80; Khaled Abou El Fadl, Cambridge U.P., 1st ed., 1st ed., 2001, p. 32; Joel L. Kraemer, 'Apostates, Rebels and Brigands', *Israel Oriental Studies* 10 (1980): 34-73.

⁹⁸¹ G.I.A.D., Draper, 'Humanitarian Law and Internal Armed Conflicts', *op. cit.*, p. 275; see also H. Lauterpacht, 'recognition in international law', Cambridge U.P., 1947, p. 176.

⁹⁸² See B.R. Roth, 'Governmental Illegitimacy in International Law', Oxford U.P., 1999.

⁹⁸³ On this point Cassese notes: "The whole approach of international law to civil war rests on an inherent clash of interests between the 'Lawful' government on the one side (which is interested in regarding insurgents as mere bandits devoid of any international status) and rebels on the other side (eager to be internationally legitimized). Third states may, and actually do, side with either party, according to their own political and

which pitted NSAGs (insurgents) against the established government within a state was divided into three different stages according to the scale and intensity of the conflict, bearing different legal consequences flowing from each namely; rebellion, insurgency and belligerency.⁹⁸⁴

3.5.2 The three tier hierarchy

3.5.2.1 Non-application of the laws of war to situations of rebellion

Violence within a state is labeled a rebellion ‘so long as there is sufficient evidence that the police forces of the parent state will reduce the seditious party to respect the municipal legal order.’⁹⁸⁵ International law does not purport to grant protections to participants in rebellions.⁹⁸⁶ Rebellions often revolved around single issue concerns, modern examples may include Soviet food riots or Indian language riots, to name a few.⁹⁸⁷ In such situations a local rebellion ‘warranted no acknowledgement of its existence on an extra-national level.’⁹⁸⁸ At least one eminent international lawyer does not even consider rebellion as a category of internal armed conflict.⁹⁸⁹ Thus the attitude of international law towards rebellion was the most straightforward compared to the other two categories, especially if the uprising by a section of the population in the shape of rebellion was to be put down swiftly and effectively through the operation of internal security forces. In this case the conflict remained as a purely internal matter. As a result, the rebels were not granted any rights or protection under international law.⁹⁹⁰ Furthermore, the established government would brand them as criminals

ideological leanings, and this of course, further complicates the question.”; A. Cassese, ‘International Law’, *op. cit.*, p. 429.

⁹⁸⁴ H. Wilson, ‘International Law and the Use of force by National Liberation Movements’, Oxford U.P., 1988, pp. 22-29.

⁹⁸⁵ L. Kotsch, ‘The Concept of War in Contemporary History and International Law’, Geneva: Librairie, 1956.

⁹⁸⁶ *Ibid*, pp. 230-231.

⁹⁸⁷ See R.W. Gomulkiewicz, ‘International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency’, 63 *Wash. L. Rev.* 43.

⁹⁸⁸ Falk, ‘Janus Tormented: The International Law of Internal War’, *op. cit.*, p. 199. Higgins only acknowledges insurgency and belligerency as forms of internal conflict. R. Higgins, ‘International Law and Civil Conflict’, in ‘International Regulations of Civil Wars, 169, p. 170.

⁹⁸⁹ Higgins only acknowledges insurgency and belligerency as forms of internal conflict. R. Higgins, ‘International Law and Civil Conflict’, in ‘International Regulations of Civil Wars’, Evan Luard (ed.), New York U.P., 1st ed., 1972, p. 170.

⁹⁹⁰ R.A. Falk, ‘Janus Tormented: The International Law of Internal War’, in *International Aspects of Civil Strife* 185, 205, *op. cit.*; Sandoz, et al., ‘Commentary on the Additional Protocols’ *op. cit.*, p. 1321.

undeserving any legal protection. This kind of attitude is still prevalent among many states and legal scholars even till the early part of the twenty-first century.⁹⁹¹

It is worth noting that it was within the remit of traditional international law whether the third states were to maintain normal relations with the aforementioned government and were also permitted to lend it support in the suppression of the rebellion.⁹⁹² On the other hand assisting rebels by a third state was not permitted according to international law on the basis of prohibition of intervention in the domestic affair of a state. On this crucial point Wilson states that ‘because rebels have no legal rights, and may not legitimately be assisted by outside powers, traditional international law clearly favors the established government in the case of rebellion, regardless of the cause for which the rebels are fighting.’⁹⁹³ The criteria of rebellion are rather vague and could cover a variety of situations from instances of minor disturbances including single-issue protests to a rapidly suppressed uprising.

3.5.2.2 The concept of insurgency

Insurgency on the other hand involves a more significant attack against the legitimate order of a state, where the insurgents are sufficiently organized and capable of mounting a serious challenge to the central government.⁹⁹⁴ As with rebellion, traditional international law provided no exact definition of insurgency. On this point Lauterpacht notes:

‘Any attempt to play down conditions of recognition of belligerency leads itself to misunderstanding. Recognition of insurgency creates a factual relation in that legal rights and duties as between insurgents and outside states exists insofar as they are expressly conceded and agreed upon for reasons of convenience, of humanity or of economic interest.’⁹⁹⁵

⁹⁹¹ A. Cullen, ‘the Concept of Non-International Armed Conflict in International Humanitarian Law’, Cambridge U.P., 2010, p. 10.

⁹⁹² According to Falk, ‘external help for the rebels constitutes illegal intervention. Furthermore, the incumbent government can demand that foreign states accept the inconvenience of domestic regulations designed to suppress rebellion, such as closing of ports or interference with normal commerce ... There is also duty to prevent domestic territory from being used as an organizing base for hostile activities overseas ... thus if an internal war is a ‘rebellion’, foreign states are forbidden to help the rebels are permitted to help the incumbent, whereas the incumbent is entitled to impose domestic restrictions upon commerce and normal alien activity in order to suppress the rebellion.’ Falk, ‘Janus Tormented: The International Law of Internal War’, *op. cit.*, p. 198.

⁹⁹³ Wilson, ‘International Law and the Use of force by National Liberation Movements’, *op. cit.*, p. 24

⁹⁹⁴ R.P. Dhokhalia, ‘Civil War and International Law’ (1971) 11 *Indian JIL*, 219, at 225-226.

⁹⁹⁵ Hersch Lauterpacht, ‘Recognition in International Law’, Cambridge U.P., 1947, pp. 276-277.

Thus it is generally agreed upon that recognition of insurgency is recognition of ‘factual relation’ or in effect acknowledgement of the fact that of existence of an internal armed conflict taking place.⁹⁹⁶ Beyond that, according to Wilson there is little description of the characteristics of the ‘fact’, she opines:

‘There are no requirements for the degree of intensity of the violence, the extent of control over the territory, the establishment of a quasi-governmental authority, or the conduct of operations in accordance with any humanitarian principles which would indicate recognition of insurgency is appropriate. Indeed, the only criterion of recognition, if one could call it that is necessity.’⁹⁹⁷

The upshot of this was that other states were left substantially free to determine the consequence of this acknowledgement.⁹⁹⁸ An analysis of traditional international law leads us to deduce that in order for rebels to be elevated to the status of insurgency, they had to occupy a considerable portion of the state in which the internal conflict is taking place. Recognition of insurgency also constitutes a belief by a foreign power that the insurgents should not be executed upon capture.⁹⁹⁹ Some scholars of international law such as Higgins and Greenspan have suggested that by conferring the status of ‘insurgents’ upon any rebel group, they are taken out of the domestic legal system and firmly onto the international law forum. In their opinion, recognition of insurgency means that the rebels are no longer law-breakers but contestants-at-law.¹⁰⁰⁰ Others such as Castren maintain that the status of insurgency does not confer any rights or duties on the group and they should still be subjected to the domestic criminal law of the state concerned.¹⁰⁰¹ However, Falk is of the opinion that by granting a rebellious group the status of insurgency they would be provided with quasi-international law status. He notes that ‘... a catch all designation provided by international law to allow states to determine the quantum of legal relations to be established with the insurgents. It is an international acknowledgement of an internal war but it leaves each state substantially free to control the consequences of this acknowledgement.’¹⁰⁰²

It is worth noting that recognition of insurgency does not extend beyond the territorial borders of the state in question nor does it provide the rebels with any protection under

⁹⁹⁶ Cullen, ‘the Concept of Non-International Armed’, *op. cit.*, p. 11.

⁹⁹⁷ Wilson, ‘International Law and the Use of force by National Liberation Movements’, *op. cit.*, p. 24.

⁹⁹⁸ Higgins, ‘International Law and Civil Conflict’, *op. cit.*, p. 168.

⁹⁹⁹ M. Greenspan, ‘Modern Law of Land Warfare’, University of California, 1st ed., 1959, p.620.

¹⁰⁰⁰ Higgins, ‘International Law and Civil Conflict’, *op. cit.*, p. 170; Greenspan, ‘Modern Law of Land Warfare’, *op. cit.*, p. 620.

¹⁰⁰¹ E. Castren, ‘Civil War’, *Suomalainen Tiedeakatemia* (Helsinki), 1966, p. 117.

¹⁰⁰² Falk, ‘the international Law of Civil War’, *op. cit.*, p. 199.

international law.¹⁰⁰³ In effect, such recognition according to Castren means that ‘acknowledgement of the existence of an armed revolt of grave character and the lawful government’s capacity, at least temporarily, to maintain public order and exercise authority over all the parts of the national territory.’¹⁰⁰⁴ Nevertheless, the nineteenth century heralded a sea-change in attitude of the international community towards civil wars culminating in the development of a “recognition of belligerency” doctrine.

3.5.2.3 The recognition of belligerency

The third category of civil conflict is recognition of belligerency that is much more comprehensively dealt with in international law than those of insurgency and rebellion. This is perhaps the only way in classical international law in which rebels could have been considered as international legal persons, depending very much upon the attitude of other subjects of international law, the sovereign states.¹⁰⁰⁵ The distinction in international law between insurgency and recognition of belligerency has been dealt with by the ITCY in the *Tadic* Jurisdiction Decision.¹⁰⁰⁶ It noted that the ‘dichotomy was clearly sovereignty oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign states more inclined to look after their own interest than community concerns or humanitarian demands.’¹⁰⁰⁷

By the end of the nineteenth century, it gradually became commonplace to apply these rules to internal armed conflicts of considerable proportions. Therefore, for the insurgents to be recognized the conflict had to assume the attributes of inter-state wars.¹⁰⁰⁸ As a result, upon recognition by the host state the insurgents were challenging militarily, not only as insurgents but expressly as belligerents. In reality, they as an entity became assimilated as a state actor with all the rights and obligations that flow from laws of international armed conflict.¹⁰⁰⁹ In the nineteenth century in the case of the *Santissima Trinidad and the St. Sander*, the American Supreme Court referred to recognition of belligerency by its government of a

¹⁰⁰³ Dhokalia, ‘Civil War & International Law’, *op. cit.*, pp. 219-250; Kotzsch, ‘The Concept of War in Contemporary History and International Law’, *op. cit.*, p. 233.

¹⁰⁰⁴ E. Castren, ‘Recognition of Insurgency’, 5 *Ind. JIL* 433 (1968), pp. 445-446.

¹⁰⁰⁵ Cassese, ‘International Law’, *op. cit.*, p. 124.

¹⁰⁰⁶ *Tadic* Case No. IT-94-1-AR72, para 96-96; Cullen, ‘the Concept of Non-International Armed’, *op. cit.*, p. 14.

¹⁰⁰⁷ *Ibid*, para 96.

¹⁰⁰⁸ Cassese, ‘International Law’, *op. cit.*, p. 124.

¹⁰⁰⁹ Eibe H. Riedel, ‘Recognition of Insurgency’ In Rudolf Bernhardt (ed.), ‘Encyclopedia of Public International Law’, Vol. IV, Elsevier, Amsterdam, 2000, pp. 54-6; see also Cassese, A., ‘International Law’, *op. cit.*, especially Chapter 7: ‘Other International Legal Subjects’, pp. 124-131.

condition of civil war between Spain and its colonies in Latin America.¹⁰¹⁰ In the case of *Williams v Bruffy*, the Supreme Court set out the conditions of recognition of belligerency, ‘when a rebellion becomes recognized, and attains such proportions as to be able to put formidable military force in the field, it is usual for the established government to concede to it some belligerent rights.’¹⁰¹¹

According to Lauterpacht it is permissible and possibly obligatory to recognize a condition of belligerency providing certain conditions of facts existed. They include: the existence of a civil war beyond a mere civil disturbance accompanied by a state of general hostilities; the seditious party enjoying partial military success to be capable of maintaining military operation for considerable length of time; holding and forming an alternative administration of a substantial part of the state’s territory as well as involving a large number of the population within the society; observance of the laws of war by the rebel forces and acting under responsible command.¹⁰¹² Lauterpacht also emphasizes upon the crucial point that without the latter requirements recognition of belligerency might be open to abuse for the purpose of gratuitous manifestation of sympathy with the cause of the insurgents.¹⁰¹³

By the beginning of the twentieth century a view seemed to emerge that recognition of belligerency by a foreign state must be explicit and formal, manifesting itself either through a declaration of neutrality or a specific pronouncement to the *de facto* status of the belligerents amounting to the recognition of belligerency. In 1937, Robert Wilson stated:

The sound view seems to be that, given the *de facto* existence and possession by the insurgents community of the physical and organizational attributes which would show capacity to be responsible person, recognition of belligerency still implies in the words of John Bassett Moore, ‘existence of an emergency, actual or imminent, such as makes it incumbent upon neutral powers to define their relations to the conflict.’¹⁰¹⁴

However, as far as NSAGs in the early twentieth century were concerned their legal status had to be evaluated according to the degree of control they had over the territory and

¹⁰¹⁰ As cited in R.R. Oglesby, ‘Internal War and the Search Normative Order’, Martinus Nijhoff, 1971, p. 11.

¹⁰¹¹ US Supreme Court, *Williams v Bruffy* (1877), 96 US 176, at 186; Cullen, ‘the Concept of Non-International Armed’, *op. cit.*, p. 14.

¹⁰¹² L.P. Oppenheim, ‘International Law’, ed. H. Lauterpacht, 7th ed., Longmans Green, 1952, p. 249; R. Higgins, ‘Internal War and international Law, in 3 ‘The Future of International Legal Order 81, Richard E. Black & Richard A. Falk (ed.), 1971, p. 89; Dietrich Schindler, ‘State of War, Belligerency, Armed Conflict, in ‘The New Humanitarian Law of Armed Conflict’ 3, Antonio Cassese (ed.), Oceana Publications, 1979;; Richard A. Falk, ‘Janus Tormented: the International Law of Internal War’, *op. cit.*, p. 197.

¹⁰¹³ Lauterpacht, *ibid*

¹⁰¹⁴ R. Wilson, ‘Recognition of Insurgency and Belligerency’ 31 *Am. Soc’y Int’l L. Proc.* 136 1937, p. 140.

recognition by governments.¹⁰¹⁵ As indicated earlier, international law traditionally did not recognize rebels as legal entities unless they graduated to insurgency since insurgents enjoyed international rights and obligations in relation to those states that recognized them as having such a status.¹⁰¹⁶ Antonio Cassese opines that insurgents only needed to satisfy minimal conditions to achieve such a status in which the rebels should prove that they are in effective control of a certain part of the territory and that the civil commotion has reached a certain degree of intensity and duration, beyond the mere riots and sporadic acts of violence.¹⁰¹⁷

3.5.2.4 State practice and recognition of belligerency

In practice, the occasions in which insurgents were granted belligerent rights were very few and far between.¹⁰¹⁸ In occasional cases that some states may have observed the doctrine of recognition of belligerency mostly done out of self-interest and practical purposes than adhering to international law.¹⁰¹⁹ Consequently, attempts made by international lawyers to make observance of recognition of belligerency compulsory for governments came to no avail.¹⁰²⁰ Even the theory of recognition of insurgency that developed later with the same purpose, imposing certain responsibilities upon states to apply certain rules of the laws of war to internal armed conflict, did not have much success.¹⁰²¹

Nonetheless, from the political point of view it could be argued that the abovementioned rules were devised mainly to protect the commercial interests of third states; namely the great European powers such as France and Great Britain. Existence of a civil war more often affects the commercial interest of the third state and may also affect the personal and property rights of the third state citizens who happened to be in the afflicted area.¹⁰²² Falk notes that ‘in a state system, governments have a mutual interest in their security of tenure. Hence, the

¹⁰¹⁵ H.A. Wilson, ‘International Law and the Use of Force by National Liberation Movements’, *op. cit.*, p. 24. See also R. Jennings, and A. Watts, (ed.) ‘Oppenheim’s International Law (Peace)’, 9th ed., Vol. I, part 1, Longman, London, 1996, pp. 161-83.

¹⁰¹⁶ R. Mushkat, ‘Who May Wage War? An Examination of an Old/New Question’, 2 *Am. U. J. Int’l L. & Pol’y* 97 (1987), p. 109.

¹⁰¹⁷ Cassese, ‘International Law’, *op. cit.*, 2005, p.125.

¹⁰¹⁸ Castren, ‘Civil War’, *op. cit.*, p. 39.

¹⁰¹⁹ See for example the recognition of US of Spanish colonies in their war of independence (1815); or in the Greek War of Independence by Great Britain. Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 17

¹⁰²⁰ Cullen, ‘the Concept of Non-International Armed’, *op. cit.*, p. 22.

¹⁰²¹ Y.M. Lootsteen, ‘the Concept of Belligerency in International Law’, (2000) *Military Law Review*, p. 114.

¹⁰²² J.G. Stark, ‘An Introduction to international Law’, Butterworth, 5th ed., 1963, p. 145.

bias of the system against revolutionary challenges is a logical expression of the basic idea of sovereign states exercising exclusive control over territory.’¹⁰²³

However, Castren cites other ulterior motives on the part of the sovereign states for the development of the said doctrine. He notes that ‘in order to prevent outside parties from intervening in insurrections and civil wars, states often concluded treaties according to which no assistance should be given to the insurgents should internal disturbances occur in the territory of either party.’¹⁰²⁴ On this crucial development Rosemary Abi-Saab opines that ‘if such a recognition emanated from the established government it entailed the application of the *jus in bello* in its entirety to its relation with the rebels; if it emanated from third parties it enabled them to require to be treated as neutrals by both belligerent parties.’¹⁰²⁵

But she maintains that this was a purely discretionary act.¹⁰²⁶ Recognition of belligerency was only granted once there had been substantial successes in the conflict on the part of the rebels, such as occupying a considerable part of the territory of the host state. Therefore, the parties would assert belligerent rights on par with an international conflict.¹⁰²⁷ This approach was confirmed by the Institute of International Law in 1900 through the adoption of a resolution on rights and duties of foreign states in case of insurrection. The resolution stated that recognition of belligerency should only be granted by third parties once the rebel forces were in possession of certain part of the national territory.¹⁰²⁸ However, such instances were very few and far between. This was very much reflected by the state practice at the time, as Neff notes:

In this area, the inheritance of nineteenth century remained very much in evidence, most notably in the retention of the traditional bias in favour of established governments and against insurgents. Recognition of belligerency and of insurgency were little in evidence, at least on the surface; but it was likely that they were merely sleeping and not dead.¹⁰²⁹

¹⁰²³ Richard A. Falk, ‘The Interplay of Westphalia and Charter Conceptions of the International Legal Order’ in Falk & Black (eds.), ‘The Future of the International Legal Order, Vol I, Trends and Patterns’, Princeton U.P., 1969, pp 32-70.

¹⁰²⁴ Castren, ‘Civil War’, *op. cit.*, p.39.

¹⁰²⁵ R. Abi-Saab, ‘Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern’, in ‘Humanitarian Law of Armed Conflict: Challenges Ahead’ edited by Delissen and Tanja, Martinus Nijhoff Publishers, 1st ed., 1991. p. 218

¹⁰²⁶ *Ibid.*

¹⁰²⁷ H. Lauterpacht & E. Lauterpacht, ‘International Law: Being the Collected papers of Hersch Lauterpacht’, Cambridge U.P., 1977, p. 257

¹⁰²⁸ See, ‘Rights and Duties of Foreign Powers as Regards the Established Governments in case of Insurrection’, adopted by the Institute of International Law in 1900.

¹⁰²⁹ Neff, ‘War and the Law of Nations: A General History’, *op. cit.*, p. 357.

It is worth noting that recognition of belligerency by third parties did not bind the government of the state concerned. In regard to such situations Moir is of the opinion that it imposed no duty on the established government to recognize the belligerents and that widespread recognition by foreign states undoubtedly influenced the host state to follow suit too.¹⁰³⁰

In relation to this, Gasser claims that the last case of recognition of belligerency granted by a parent state to insurgents, operating within its borders, was in the Boer War in 1902.¹⁰³¹ Although this trend was largely welcomed by states, it resulted in a legal vacuum of any international regulation for internal armed conflict.¹⁰³² Nowadays, it is claimed that these recognition of regimes that formed the essential pillars of the application of the laws of war to internal armed conflict are no longer applicable in modern international law and have been replaced by compulsory rules of IHL that apply once the intensity of the conflict has reached a certain level.¹⁰³³ It is argued that this approach adopted by modern international law is very much the reflection of the obsolete nature of such recognition regimes.¹⁰³⁴

Detter is of the opinion that the rules of recognition of belligerency in regard to the laws of armed conflict have now been 'abandoned', mainly due to the political reality that no government of a sovereign state would recognize the belligerency of a rebel movement on its territory since it would be in direct challenge to its political legitimacy and territorial integrity.¹⁰³⁵

To summarize, according to classical international law rebels, insurgents and belligerents were the main categories of NSAGs which were positioned according to degrees of control over certain territory and recognition of belligerency by states. Rebels were considered to have rights under international law only once they had upgraded to insurgency, which in turn they would have obligations with regard to those states that recognized them as having such a status. But even in regard to insurgents, there was no unanimity amongst international lawyers on this legal status as there was no accurate legal definition in international law. But only when insurgents were recognized expressly by the host state as belligerents, did they

¹⁰³⁰ L. Moir, 'The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflict to 1949', 47 *ICLQ* 337 1998, p.341.

¹⁰³¹ H-P. Gasser, 'International Humanitarian Law', in H. Haug (ed.), *Humanity for all: the International Red Cross and Red Crescent Movement* (Haupt, 1993), p. 491 at 559.

¹⁰³² Moir, 'towards the Unification of International Humanitarian Law', *op. cit.*, p. 111.

¹⁰³³ Cullen, 'the Concept of Non-International Armed', *op. cit.*, p. 22.

¹⁰³⁴ R. Abi-Saab, 'Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern', *op. cit.*, p. 211.

¹⁰³⁵ I. Detter, 'The Law of War', Cambridge U.P., 2nd ed., 2000, p.43; see also F. Kalshoven, 'Applicability of Customary international Law in Non-international Armed Conflict' in 'Current Problems in international Law: Essays on U.N. Law and the Law of Armed Conflict', Cassese (ed.), A.G. Giuffrè, Milano, 1975.

become *de facto* state actors with all the rights and obligations. But in reality such recognition almost never occurred. Recognition of belligerency and insurgency inherited from the nineteenth century were not completely dead but very much pushed to the background. However, they would find a new utility and some relevance in the twenty-first century. Another contributory factor to the contemporary disuse of the recognition of belligerency doctrine was the outlawry of war and the use of the phrase “armed conflict” in the drafting of the Geneva Conventions of 1949.¹⁰³⁶

3.6 Humanization of the law of war: a modern approach

Until the second half of the twentieth century, the violence within states and acts of sovereign leaders remained outside the scope of international law, not even customary international law was applicable.¹⁰³⁷ This was in spite of the fact that in the twentieth century major internal conflicts such as the Spanish civil war of 1936-1939,¹⁰³⁸ the Greek Civil war of 1946-49,¹⁰³⁹ and the Chinese civil war of 1945-49,¹⁰⁴⁰ took place with more regularity. As a result, causing so much suffering worldwide and in such conflicts humanitarianism was least regarded.¹⁰⁴¹ The beginning of the twentieth century also witnessed efforts by the International Committee of Red Cross (ICRC) to devise some international regulation applicable to internal armed conflicts.¹⁰⁴² In the intervening years between the two Hague Conventions (1899 & 1907) and the 1949 Geneva Conventions, the 1929 Geneva Conventions were the only codification

¹⁰³⁶ Cullen, ‘the Concept of Non-International Armed Conflict’, *op. cit.*, p. 21.

¹⁰³⁷ Solis notes that “*in effect, dictators and despots were free to do as they would to their own peoples within their own borders, with no other state to interfere*”; G.D. Solis, “The Law of Armed Conflict: International Humanitarian Law in War”, Cambridge U.P., 2010, p. 97; see also R.A. Falk, ‘Legal Order in a Violent World’, Princeton U.P., 1968, pp. 109-156.

¹⁰³⁸ The Spanish Civil War was also an example of a “proxy war” prior to the Second World War which took place between mid-1936 and early 1939, was the bloodiest proxy war in the history of the twentieth century in Europe. G.R. Esenwein, ‘The Spanish Civil War: A Modern Tragedy’, Routledge, p. 156; see also P.G. Jessop, ‘The Spanish Rebellion and International Law’, 15 *Foreign Affairs* 260 1936-1937.

¹⁰³⁹ P. Wyden, ‘The Passionate War: the Narrative History of the Spanish Civil War, 1936-39’, Simon & Schuster, New York, 1983, p. 982-4; see also P. Carabott & T.D. Sfikas (ed.), ‘The Greek Civil War: Essays on a Conflict of Exceptionalism and Silence’, Ashgate Publishing, 2004.

¹⁰⁴⁰ See J. Gazzini, ‘Some International Aspects of the Chinese Civil War’, *JCSL*, 1996; 1: 141- 159; O.A. Westad, ‘Cold War and Revolution: Soviet-American Rivalry and the Origins of the Chinese Civil War’, Columbia U.P., 1993.

¹⁰⁴¹ H. McCoubrey, ‘Humanitarian Provisions in Non-International Armed Conflict’, in ‘International Humanitarian Law: the Regulation of Armed Conflict’, Dartmouth Publishing, 1990, p. 171.

¹⁰⁴² One of such resolutions was adopted by the ICRC in 1921, establishing for the first time the right of all victims of civil wars to receive aid and relief from Red Cross Societies and in default the ICRC; See Resolution XIV of the 10th International Red Cross and Red Crescent Conference, Geneva 1921. This resolution enabled the ICRC to offer its service in the Upper Silesia conflict, as the German and Polish Red Crosses could not intervene; Moir, ‘The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflict to 1949’, *op. cit.*, p. 125.

attempt that due to lack of consensus between major powers did not receive universal approval.¹⁰⁴³ The shortcomings of the Geneva Conventions of 1929 exposed by the Second World War prompted the international community to adopt four new Conventions for the protection of the victims of war in 1949.¹⁰⁴⁴

It is worth noting that a few months prior to the adoption of the 1949 Geneva Conventions another important step had been taken by the international community by the adoption of the Universal Declaration of Human Rights in 1948 by the U.N. General Assembly.¹⁰⁴⁵ Hence a clear indication by the international community that international legal regulations were no longer only concerned with inter-state relations; this was a clear signal that it was now also concerned with the internal order of states too.¹⁰⁴⁶

In the aftermath of the Second World War and the formation of the United Nations, the International Military Tribunal in Nuremberg and the Nuremberg principles, did the act of state doctrine eventually lost its verve.¹⁰⁴⁷ Hence, the international community deemed it necessary to deal with this mode of armed conflict,¹⁰⁴⁸ and this deficiency was eventually remedied by the adoption of the Geneva Conventions on 12 August 1949.¹⁰⁴⁹ Most important of all to this study Common Article 3 to all the Geneva Conventions in which the respect for basic standards of humanity in non-international armed conflict and especially protection of

¹⁰⁴³ Convention for Amelioration of the Condition of the Wounded and Sick in Armies in the Field 1929; Convention Relative to the Treatment of Prisoners of War 1929; E.K. Kwakwa, 'The International Law of Armed conflict: Personal and Material Fields of Application', Martinus Nijhoff Publishers, 1992, p. 163.

¹⁰⁴⁴ It should be emphasised that the four Geneva conventions were very much reflected and based upon the atrocities committed by the Axis Powers during the course of the World War II; G.I.A.D. Draper, 'The Enforcement of the Geneva Conventions of 1949 and the Additional Protocols of 1977' in *Recueil des cours de l'Academie de droit international de la haye*, volume 164, 1979-III.

¹⁰⁴⁵ G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); text available at: <http://www.un.org/en/documents/udhr/>

¹⁰⁴⁶ Cassese, 'International Law', *op. cit.*, p. 59.

¹⁰⁴⁷ This also reflected a trend in codification of international law in the aftermath of World War II; for an analysis of this phenomenon, see R. Wolfrum, 'Introduction', in R. Wolfrum & V. Roben, 'Development of International Law in Treaty-Making', Berlin: Springer, 2005, p. 1. U.N., *Yearbook of International Law Commission*, 1950, vol. II, p. 374.

¹⁰⁴⁸ In the words of Higgins:

"It has long been recognized that an internal war may have international repercussions, and international law has therefore sought to provide some guidance on what relations other nations may pursue with both the government and the rebels. Equally, international law has long had an interest in promoting minimum standards in the conduct of hostilities; and in recent years it has come to acknowledge that at least some of the rules devised must apply to internal, as well as to international war."; J Higgins, 'International Law and Civil Conflict', *op. cit.*, p. 169; see also K. Kleffner, 'From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities – on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years after the Second Hague Peace Conference', *NILR* (2007), 54:315-336, p. 317.

¹⁰⁴⁹ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, 75 *U.N.T.S.* 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, 75 *U.N.T.S.* 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, 75 *U.N.T.S.* 135.; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, 75 *U.N.T.S.* 287; A. Roberts & R. Guelff, 'Documents on the Laws of War', 3rd ed., 2000, pp. 195-369.

civilians in such situations was enshrined.¹⁰⁵⁰ Significantly, according to the said conventions, IHL provisions were compulsory irrespective of which party decided to resort to force, the Convention also confirmed the autonomy and distinction of *jus ad bellum* and *jus in bello*.¹⁰⁵¹

International human rights law (IHRL) has played an important role since its introduction into international discourses in the aftermath of the World War II. It is basically concerned with the relationship between states, their own nationals and alien nationals under their jurisdiction.¹⁰⁵² It has to be emphasised that IHRL is now an integral part of the fabric of international law and relations for the common welfare of humanity and represents common values that no state can deny its citizens even in time of armed conflict.¹⁰⁵³ The origins of the modern human rights law can be traced to the visionaries of the enlightenment who sought a more just relationship between the state and its citizens.¹⁰⁵⁴ Prior to this human rights had been granted to individuals through bill of rights, constitutional law or in very rare cases international treaty instruments for protection of minorities following the First World War, a subject of national law until the end of the Second World war.¹⁰⁵⁵ In order to supervise and control states, IHRL has also been developed in the shape of different levels of regional and universal schemes of the world.¹⁰⁵⁶ The first international instrument to deal specifically with the issue of human rights standards applicable globally was the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948.¹⁰⁵⁷ The declaration has been supplemented in 1966 by two specific treaties: the International Covenant on

¹⁰⁵⁰ For the history of the various attempts undertaken by the ICRC to reform the international humanitarian laws of civil war see G. Best, 'War and Law Since 1945', Oxford U.P., 1994, pp. 168-169.

¹⁰⁵¹ F. Bugnion, *Jus ad Bellum and Jus in Bello* and Non-International Armed conflict, *YIHL*, Vol. 6, 2003, pp. 1676-198, p. 173.

¹⁰⁵² See P. Alston (ed.), 'The United Nations and Human Rights: A Critical Appraisal', Oxford Clarendon Press, 1992; Buergenthal, T., 'International Human Rights in a Nutshell', St. Paul: West Publishing, 1995; Cassese, A., 'Human Rights in a Changing World', Temple U.P., 1990; Donnelly, J., 'International Human Rights', Boulder, Westview Press, 1993; Hannum, H. (ed.), 'Guide to International Human Rights Practice', Pennsylvania U.P., 1992; Henkin, L. (ed.), 'The International Bill of Rights: The Covenant on Civil and Political Rights', Columbia U.P., 1981; A. Robertson & J. Merrills, 'Human Rights in the World', Manchester U.P., 1989; P. Sieghart, 'The International Law of Human Rights', Oxford, Clarendon Press, 1983.

¹⁰⁵³ C. Tomuschat, 'Obligations Arising for States against their Will', *Recueil des Cours*, No. 241, Vol. IV/1993, Nijhoff, The Hague, 1994, p. 195; H-J. Heintze, 'On the Relationship between Human Rights, Protection and International Humanitarian Law', *IRRC*, December 2004 Vol. 86 No. 856, p. 789.

¹⁰⁵⁴ See generally M. Ishay, 'The History of Human Rights: from Ancient Times to the Globalization Era', University of California Press, 2nd ed., 2008, pp. 63-116.

¹⁰⁵⁵ Such as the *Magna Carta* of 1215 the United Kingdom Bill of Rights of 1688, the French Declarations of the Right of Man and of the Citizens of 1789, the U.S. Bill of Rights of 1791; see generally J.H. Burgers, 'The Road to San Francisco: The Revival of Human Rights Idea in the Twentieth Century', 14 *Hum. Rts. Q.* 447 (1994); see also Quenivet, 'the History of the Relationship between International Humanitarian Law and Human Rights Law', *op. cit.*, p. 2.

¹⁰⁵⁶ R.E. Vinuesa, 'Interface, Correspondence and Convergence of Human Rights and International Humanitarian law', *YIHL*, Vol. 1, 1998, pp. 69-110, p. 71.

¹⁰⁵⁷ UNGA Res. 217 (III) (1948).

Economic, Social and Cultural Rights (ICESCR)¹⁰⁵⁸ and the International Covenant on Civil and Political Rights (ICCPR).¹⁰⁵⁹ Subsequently, these instruments have been supplemented by four regional treaties.¹⁰⁶⁰

In the aftermath of the creation of the UN the interrelation between IHL and IHRL was rather non-existent. This was in the light of the fact that the UN in particular was reluctant to include matters concerning the laws of war (IHL) in its agenda, as it has been noticed it could have undermined the force of *jus contra bellum* as well as compromising the impartiality of the UN as a truly world body to maintain peace.¹⁰⁶¹ In contrast, Schindler is of the opinion that in spite of the UN exerting a considerable amount of pressure upon the outcome of the diplomatic conference the influence of UDHR left an imprint on the 1949 Geneva Conventions. In his opinion the inclusion of Common Article 3 by the diplomatic conference constitutes a human rights provision since it aims to regulate the relationship between the state and its nationals in times of non-international armed conflict.¹⁰⁶² Some scholars state that, 'the greatest departure made by the Geneva Law of 1949, may be regarded as a manifesto of human rights for civilians during armed conflict, is the Fourth Convention related to the protection of civilians.'¹⁰⁶³ Doswald-Beck also notes that the willingness to regulate internal armed conflicts by treaty-law arose when IHRL came into being and became central to the UN's approach.¹⁰⁶⁴

¹⁰⁵⁸ Annex to U.N.G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 933 U.N.T.S. 3, entered into force Jan. 3, 1976.

¹⁰⁵⁹ Annex to U.N.G.A. Res. 2200A (XXI), 21 U.N. GAOR (Supp. Vo. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171, entered into force Mar. 23 1976.

¹⁰⁶⁰ The European Convention for Protection of Human Rights and Fundamental Freedom (ECHR), Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 222. The ECHR has subsequently been supplemented by twelve protocols; The European Social Charter (ESC), Turin, 18 October, in force 26 February 1965, ETS No. 35; The American Convention on Human Rights (ACHR), San Jose, 22 November 1969, in force 18 July 1978, 9 *ILM* 673 (1970). The ACHR has been supplemented by the San Salvador Additional Protocol on Economic, Social and Cultural Rights, 14 November 1988, in force 16 November 1999, 28 *ILM* 161 (1989); The African Charter of Human and Peoples' Rights (ACHPR), Banjul, 27 June 1981, in force 21 October 1986, 21 *ILM* 59 (1982).

¹⁰⁶¹ Kolb highlights the fact that the UDHR 'completely bypassed the question of respect for human rights in armed conflict, while at the same time human rights were scarcely mentioned during the drafting of the 1949 Geneva Conventions.' R. Kolb, 'The Relationship between International Humanitarian Law and Human Rights Law: a Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions', 324 *Int'l Rev. Red Cross* 400 (1998), pp.409-419.

¹⁰⁶² D. Schindler, 'International Humanitarian Law: Its Remarkable Development and its Persistent Violation', 5 *Journal of History of International Law*, 165-188 (2003), p. 170.

¹⁰⁶³ L.C. Green, 'Human Rights and the Laws of Armed Conflict', in L.C. Green (ed.), 'Essays on the Modern Law of War', Transnational Publishers, 2nd ed., 1999, pp. 435, 448

¹⁰⁶⁴ Doswald-Beck, 'Implementation of International Humanitarian Law in Future Wars', p. 37.

3.7 Article 3 Common to the four Geneva Conventions of 1949

3.7.1 The drafting history of Common Article 3

In reality, Common Article 3 often referred to as a Geneva Convention in miniature,¹⁰⁶⁵ was the outcome of extensive negotiations and compromise at the adoption of the Geneva Conventions in regard to non-international conflicts which features in each of the four conventions.¹⁰⁶⁶ The final draft of Common Article 3 is far less ambitious than the rules adopted by the Stockholm Red Cross Conference of 1948.¹⁰⁶⁷ It is a well-known fact that initially the ICRC had intended to adopt a common definition for armed conflict but could not reach a formula acceptable to the majority of states.¹⁰⁶⁸ In the Draft conventions for the Protection of War Victims, the ICRC submitted the following paragraph to the Seventeenth Red Cross Conference which would have featured as the fourth paragraph of Common Article 2. It says:

‘In all cases of armed conflict which are not of international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of Convention in these circumstances shall in no way depend on the legal status of the parties to the conflict and shall have no effect on that status.’¹⁰⁶⁹

¹⁰⁶⁵ For example, *Prosecutor v. Kayishema and Ruzindana*, ICTR-96-1-A, Trial Judgment (1 June 2001), para. 165; also Pictet, Commentary, IV Geneva Convention, *op. cit.*, at 34.

¹⁰⁶⁶ It has been described as a ‘mini-convention’ or as a ‘convention within the conventions’; The four Geneva Conventions of 1949, for example, comprise a total of 429 articles. Only one, Common Article 3, is not specifically concerned with international armed conflict, see Jean Pictet, *et al.*, ‘Commentary on the Geneva Conventions of 12 August 1949’, Volume III, ICRC: Geneva, 1958, at 48, [hereinafter ICRC Commentary III]; Suter, ‘An International Law of Guerrilla Warfare’, *op. cit.*, p. 8.

¹⁰⁶⁷ For the legislative history of Article 3, see ‘Report on the work of the Preliminary Conference of National Red Cross Societies for the study of the Conventions and of various problems relative to the Red Cross, Geneva, July-August, 1946’ (Geneva, ICRC 1947) pp. 14-15, 70-71 and 105; Report on the work of the Conference of Government Experts for study of the Conventions for the Protection of War Victims, Geneva, April, 1947’ (Geneva, ICRC 1947) pp. 8-9, 103 and 272; XVIIth International Conference of the Red Cross, Stockholm, August 1948, Draft Revised or New Conventions for the Protection of War Victims, Doc. No. 4a (Geneva, ICRC 1948) pp. 5-6, 35-36, 53-54 and 156-157.

¹⁰⁶⁸ Draft Convention for the Protection of War Victims submitted to the XVIIth I.C.R.C. Conference at Stockholm.

¹⁰⁶⁹ Pictet, ICRC Commentary III, *op. cit.*, p. 33.

Indeed, by adopting this extra paragraph the entirety of the Geneva Conventions would have been applicable to all internal armed conflict.¹⁰⁷⁰ Within the Joint Committee charged with evaluating the common article, two schools of thought existed. On the one hand, there was a group of states that rejected the draft in this form fearing that it gave belligerent status to any insurgents who may be no more than a small group of rebels and it failed to adequately protect the rights of states at the expense of individual rights.¹⁰⁷¹ On the other, there was another group of states that believed, the draft article would ensure its humanitarian purpose and would not prevent a legitimate government from taking measures under its own penal law to curb acts considered illegal, dangerous to the order and security of the state.¹⁰⁷² Many states including mostly newly independent states argued that such an approach, ‘would amount to [a] mandatory and automatic recognition of belligerency.’¹⁰⁷³ The majority of sovereign states were reluctant to abandon the legal distinction between international and non-international conflicts, the very corner stone of IHL. The diplomatic conference rejected the paragraph on the basis that it would undermine the sovereign prerogative of states.¹⁰⁷⁴ Nonetheless, it serves as a reminder of what the drafters of the convention intended to achieve, but as Cullen notes the support for such an approach could never be successful because of its impact on state sovereignty.¹⁰⁷⁵

3.7.2 The substitution of ‘armed conflict’ for ‘war’

The adoption of Common Article 3 altered the way internal armed conflict was viewed and dealt with by state practice in traditional international law.¹⁰⁷⁶ By adoption of this provision recognition of armed conflict by the established government or a third state became obsolete.¹⁰⁷⁷ The recognition procedures were replaced by compulsory rules of IHL that started applying as soon as the hostilities reached a certain threshold and the conditions for

¹⁰⁷⁰ Pictet, ICRC Commentary III, *op. cit.*, p. 31.

¹⁰⁷¹ Including Australia, Canada, China, France, Greece, Italy, Spain, the United Kingdom and the United States, Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 24.

¹⁰⁷² Including Denmark, Hungary, Mexico, Norway, Romania and USSR, Moir, *ibid.*

¹⁰⁷³ ICRC Commentary III, *op. cit.*, pp. 32-33.

¹⁰⁷⁴ G. Abi-Saab, ‘Conflicts of a Non-international Character’, in ‘International Dimensions of Humanitarian Law’, UNESCO, Martinus Nijhoff Publishers, 1988, p. 220.

¹⁰⁷⁵ Cullen, ‘The Concept of Non-International Armed Conflict in International Humanitarian Law’, *op. cit.*, p. 89.

¹⁰⁷⁶ Cullen, ‘the concept of Non-International law’, *op. cit.*, p. 27.

¹⁰⁷⁷ D. Schindler, ‘Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’, *Recueil Des Cours*, Vol. 163(2), 1979, 121-159, pp. 145-146.

applicability of IHL had been fulfilled.¹⁰⁷⁸ Furthermore, the term ‘armed conflict’ was used instead of ‘war’ in the Geneva Conventions of 1949 in order to broaden the basis for the application of the IHL and in doing so to avoid any confusion over the legal definition of war.¹⁰⁷⁹ During the time of drafting of the Geneva Conventions there was confusion surrounding the legal meaning of ‘armed conflict’, although the term had been used before in the Hague Regulations of 1899 and 1907, but not in the framework of a substantive provision relating to the field of application regarding either instrument.¹⁰⁸⁰ It has been suggested that the term ‘armed conflict’ was employed by drafters of the Geneva Conventions to avoid complications of recognition not only in relation to civil war, but also in relation to international armed conflict.¹⁰⁸¹

The ICRC Commentary on the first Geneva Convention also focused on the ambiguous meaning of armed conflict:

‘It remains to ascertain what is meant by ‘armed conflict’. The substitution of this much more general expression for the word ‘war’ was deliberate. One may argue almost endlessly about the legal definition of ‘war’. A state can always pretend, when it commits a hostile act against another state, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression ‘armed conflict’ makes this less easy.’¹⁰⁸²

3.7.3 The intended scope of Common Article 3

The scope of application of Article 3 is defined negatively as ‘it applies in conflicts not of an international character.’ In spite of lack of unanimity amongst delegates they eventually settled on a watered down version of the Article which established minimum humanitarian protections applicable in “armed conflicts not of international character occurring within the

¹⁰⁷⁸ As noted by Roberts and Guelff, ‘[t]he laws of war, as embodied in customary international law, were regarded as applicable in a civil war if the government of the state in which an insurrection existed, or a third state, chose to recognize the belligerent status of the insurgent group and thereby acknowledge the law’s application. In addition, absent recognition of belligerency, there were instances in which the law was treated by parties in civil war, or third parties, being applicable.’ Roberts & Guelff, ‘Documents on the Laws of War’, *op. cit.*, pp. 481; A. Clapham, ‘Human Rights Obligations of Non-State Actors in Conflict Situations’, *IRRC*, vol. 88, no. 863, *op. cit.*, p. 492.

¹⁰⁷⁹ Cullen, ‘The concept of Non-International law’, *op. cit.*, p. 27.

¹⁰⁸⁰ See J. Brown-Scott, *The Proceedings of the Hague Peace Conference: Translations of the Official Texts*, vols. 1-5, Oxford U.P., 1920-21.

¹⁰⁸¹ Cullen, ‘The Concept of Non-International Law’, p. 21

¹⁰⁸² Pictet (ed.), *Commentary I*, p. 32.

territory of one of the High Contracting Parties'.¹⁰⁸³ The insurgents and the government forces alike were required to respect "as a minimum" certain basic standards of international humanitarian law contained in the aforementioned Article.¹⁰⁸⁴ In addition, it prohibits certain acts including murder, torture, and inhuman treatment directed against "persons taking no active part in the hostilities".¹⁰⁸⁵ Common Article 3 is considered a major step forward by providing minimum humanitarian standards towards protection of persons taking no active part in the hostilities but does not provide any provisions for conduct of hostilities or means and methods of warfare.¹⁰⁸⁶ Article 3, Common to all Geneva Conventions, 1949 provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, at a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised people.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross may offer services to the Parties to the conflict. The Parties to the conflict

¹⁰⁸³ C. Smith, 'Common Article 3 of the Geneva Conventions as a Minimum Standard in International Humanitarian Law' 13 *Israel Law Review* 168 2005, p. 169.

¹⁰⁸⁴ See D.A. Elder, 'The Historical Background of Common Article 3 of the Geneva Convention of 1949', 11 *Case Western Reserve Journal of International Law* 37 1979; G.I.A.D. Draper, 'Humanitarian Law and Internal Armed Conflicts', 13 *Ga. J. Int'l & Comp. L.* 253 1983, pp. 268-272

¹⁰⁸⁵ For example see, Tom Farer, 'Humanitarian Law and Armed Conflicts: Towards a Definition of International Armed conflict', 71 *Colum. L. Rev.* 37 (1971).

¹⁰⁸⁶ Generally see V.S. Shastri, 'International Humanitarian Law Relating to Non-international Armed Conflict', in 'International Humanitarian Law: An Anthology', Lexis-Nexis Publication, 2009, pp. 207-238.

shall further endeavour to bring into force, by means of special agreement, all or part of the other provisions of the present Convention. The application of the proceeding provisions shall not affect the legal status of the Parties to the conflict.

It is generally accepted that low-intensity disturbances and tensions are excluded from the ambit of common Article 3 of the Geneva Conventions.¹⁰⁸⁷ Bond notes, if all Article 3 does is to impose ‘a few essential rules which [a government] in fact respects daily, under its own laws, even when dealing with common criminals, then one might wonder why so many scholars have praised the Article and so many states are opposed to its application’.¹⁰⁸⁸

The Article also stipulates that in the absence of a specific body to administer and supervise the states’ compliance with Common Article 3, the ICRC may offer its services as an honest broker to the parties of the conflict, but states are under no obligation to accept the offer of the service.¹⁰⁸⁹ In practice, state parties tend to be very specific about the service and assistance of ICRC.¹⁰⁹⁰ Nonetheless, in the vast majority of cases states parties rejected ICRC’s assistance maintaining that the said conflict was a mere civil disturbance and falls under the domestic jurisdiction of the state.¹⁰⁹¹

3.7.4 The binding nature of Common Article 3 upon states & NSAGs

Common Article 3 sets out clearly who is bound by its provisions – it is to be observed by ‘each party to the conflict’.¹⁰⁹² In Common Article 1 of the 1949 Geneva Conventions, the high contracting parties agree to respect and ensure respect for instruments established by the conventions in all circumstances. Some observers have stated that by adoption of this provision the high contracting parties are stripped of the possibility of using arguments based

¹⁰⁸⁷ See P. Kooijmans, ‘In the Shadowland between Civil War and Civil Strife’, in ‘Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honor of Frits Kalshoven, edited by Delissen and Tanja, Dordrecht: Nijhoff, 1st ed., 1991.

¹⁰⁸⁸ J.E. Bond, ‘Internal conflict and Article 3 of the Geneva Conventions’ (1971) 48 *Denver LJ* 263 at 270; however, in contrast, Greenwood notes that a single sentence – “the wounded and sick shall be collected and cared for” – deals with the work that in the case of international conflicts were achieved by two entire Conventions; C. Greenwood, ‘International Humanitarian Law (Laws of War): Revised Report of the Centennial Commemoration of the First Hague Peace Conference 1899’, *op. cit.*, p. 226.

¹⁰⁸⁹ The presence of the ICRC does not automatically mean that the parties are complying with Article 3, according to Cho, by accepting the offer of ICRC seem to ‘promote the appearance of compliance while enjoying the putative benefits of violations’; S. Cho, ‘Applicability of International Law to Internal Armed Conflicts’, PhD Thesis, University of Cambridge, 1996, p. 13.

¹⁰⁹⁰ Farer, ‘Humanitarian Law and Armed Conflicts: Towards the Definition of Armed Conflict in International Armed Conflict’, *op. cit.*, pp. 37-39.

¹⁰⁹¹ Shasthri, ‘International Humanitarian Law Relating to Non-international Armed Conflict’, *op. cit.*, p. 213.

¹⁰⁹² Moir, ‘the Law of Internal Armed Conflict’, *op. cit.*, p. 52.

on legality of use of force to be released from their obligations under the GC.¹⁰⁹³ Moreover, Common Article 2 states that the conventions apply to all cases of declared war or of any other armed conflict which may arise between two or more high contracting parties, even if a state of war is not recognized by one of them. Therefore, it prohibits states from using the excuse of being victim of aggression to justify their refusal from applying IHL to conflicts which NSAGs are engaged. Nevertheless, the most significant characteristic contained in Common Article 2 is the notion of power which directly deals with NSAGs. It states:

... Although one of the powers in conflict may not be a party to the present Conventions, the powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said power, if the latter accepts and applies the provisions thereof...

Therefore, the Conventions would apply the moment any NSAG attains the status of having the label of “power” attached to it within the conception of the framers of the Conventions.¹⁰⁹⁴ The attempt to bind NSAGs involved in the conflict in light of the fact that they are not party to the Conventions poses a major obstacle. In the 1974-1977 Diplomatic Conference, the representative of Belgium stated that Common Article 3 was binding upon ‘both states and rebels’, since Additional Protocol II was meant to develop and supplement the said Article.¹⁰⁹⁵ Also Cassese is of the opinion that the binding nature of Common Article 3 upon insurgents is ‘undisputed’.¹⁰⁹⁶ Kalshoven notes that the article presents a peculiar problem in that armed opposition groups (NSAGs) who are not signatory to the Conventions may use that fact as an argument to deny any obligation to apply the article. He argues that by encouraging armed opposition groups to adhere to Article 3 provisions it is likely to entail improvement of their ‘image’, not only in the country of conflict but in the eyes of the world at large.¹⁰⁹⁷ The most commonly advanced legal justification is the doctrine of legislative justification.¹⁰⁹⁸ According to which the insurgents are bound by provisions of Article 3 on the basis that the parent state has ratified the Geneva Conventions. There are ‘strong indications that state practice assumes that these provisions ... are binding also for the rebels ...’ and as a result one can point to ‘state practice and *opinio juris*’ to the extent that the

¹⁰⁹³ Hasthri, ‘International Humanitarian Law Relating to Non-international Armed Conflict’, *op. cit.*, p. 213.

¹⁰⁹⁴ A.P. Ruben, ‘The Status of Rebels under the Geneva Conventions of 1949’ 21 *ICLQ* 472 1972, p. 474.

¹⁰⁹⁵ See Moir, ‘The law of Internal Armed Conflict’, *op. cit.*, p. 52.

¹⁰⁹⁶ A. Cassese, ‘The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed conflict’, 30 *ICLQ* 416 1981, p. 424.

¹⁰⁹⁷ F. Kalshoven & L. Zegveld, ‘Constraints on the Waging of War: An Introduction to International Humanitarian Law’, ICRC (Geneva), 1st ed., 2001.

¹⁰⁹⁸ Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 53.

‘ratification of Article 3 of the Geneva Conventions ... has the effect that also rebels are bound’.¹⁰⁹⁹ This approach has attracted broad acceptance among scholars,¹¹⁰⁰ although some remain sceptical such as Moir who describes this argument as politically untenable.¹¹⁰¹

Nevertheless, it has been suggested that not only do the insurgents have to comply with the requirement of Article 3 through certain amount of organization, but also a certain degree of possession of national territory. Control of territory also featured quite prominently in the criteria suggested at the Diplomatic Conference, almost thirty years before. Additional Protocol II which went one step further to list territorial control in Article 1 of the said instrument as a precondition for its application.¹¹⁰²

It has to be emphasized that territorial control would strengthen the case for claiming that an Article 3 conflict was in progress. However, this is not to say that Common Article 3 would not apply if the insurgents do not have effective control of part of the territory of the state. As Bond concludes, the lack of territorial control, however, needs not necessarily to preclude Article 3’s application.¹¹⁰³

Another important factor in regard to Article 3 is whether the central government resorts to using the regular army in order to control the situation. On the face of it, Moir deduces that it seems perfectly sensible – the very term ‘armed conflict’ could easily be construed as implying that the military are involved in active operation. He goes on to say that ‘the organization and territorial control aspects are strongly reminiscent of the traditional doctrine of recognition of belligerency, in that where situations existed meeting those requirements, states would previously have considered a grant of belligerency to the insurgent party.’¹¹⁰⁴

The next question that arises is how would the recognition of belligerency impact on the application of Article 3? It should also be remembered that upon the recognition of belligerency by a state, the entire *jus in bello* comes into operation.¹¹⁰⁵ Therefore, the conflict

¹⁰⁹⁹ Cassese, ‘Status of Rebels’, *op. cit.*, p. 430, fn. 34, quoting a letter from Bothe.

¹¹⁰⁰ Elder, ‘The Historical Background of Common Article 3 of the Geneva Convention of 1949’, *op. cit.*, p. 55; Greenspan, ‘The Modern Law of Land Warfare’, *op. cit.*, p. 623.

¹¹⁰¹ Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 54; Cassese also remains equally unconvinced of its merit, Cassese, ‘Status of Rebels’, *op. cit.*, p. 429.

¹¹⁰² Draper, ‘The Geneva Conventions of 1949’ (1965-i) 114 *Recueil des Cours* 63.

¹¹⁰³ Bond, ‘Internal conflict and Article 3 of the Geneva Conventions’, at 272.

¹¹⁰⁴ Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 38.

¹¹⁰⁵ It is worth noting that during the negotiations the USA and Greece advanced the idea of applicability of common Article 3 conditional on a prior recognition of belligerency by the incumbent government or alternatively by the Security Council; Elder, ‘The Historical Background of Common Article 3 of the Geneva Convention of 1949’, *op. cit.*, p. 47.

becomes subject to all four Geneva Conventions in the entire corpus of the IHL, and not simply common Article 3.¹¹⁰⁶

3.7.5 State practice related to Common Article 3

In spite of the number of non-international armed conflicts taking place globally, the record of state practice in regards to the application of the Geneva Conventions has been rather limited.¹¹⁰⁷ One challenge to the IHL in the current context is the tendency of states to label as ‘terrorist’ all acts of warfare committed by NSAGs in the course of non-international armed conflicts.¹¹⁰⁸ On this point ‘one of the most assured things that might be said about the words “armed conflict not of an international nature” is that no one can say with assurance precisely what meaning they were intended to convey.’¹¹⁰⁹ It is generally accepted that in an international armed conflict belligerent forces can lawfully target military objectives.¹¹¹⁰ However, in contrast, states are very reluctant to recognize the same principles in non-international armed conflict fearful of the fact that by recognizing the belligerency they may jeopardize their territorial integrity.¹¹¹¹ Hence, states are also very reluctant to accept the applicability of Article 3 within their territory.¹¹¹² In an attempt to remedy this objection Article 3(4) goes some way to stipulate that application of its provision ‘shall not affect the legal status of the parties to the conflict’.¹¹¹³ In addition, the UK Ministry of Defence Manual states: ‘Although Common Article 3 specifically provides that its application does not affect the legal status of the parties to a conflict, states have been, always will be, reluctant to admit that a state of armed conflict exists’.¹¹¹⁴ In reality, governments of many states have been

¹¹⁰⁶ F.L. Lassa, ‘Oppenheim, International Law’, 7th ed, (edited by) Hersch Lauterpacht (London 1952), vol. II, 211-212. See also Wilson, ‘International Law and the Use of Force by National Liberation Movements’, *op. cit.*, p. 45.

¹¹⁰⁷ Cullen, ‘the Concept of Non-International Armed Conflict’, *op. cit.*, p. 55.

¹¹⁰⁸ Pejic, ‘Terrorist Acts and Groups: A Role for International Law?’, *op. cit.*, p. 75.

¹¹⁰⁹ T. Farer, ‘Humanitarian Law and Armed Conflicts: Towards the Definition of International Armed Conflict’, *op. cit.*, p. 43.

¹¹¹⁰ Additional Protocol I, Article 43(2) says: (“Members of the armed forces of a Party to a conflict ... are combatants, that is to say they have the right to participate directly in hostilities.”).

¹¹¹¹ This is mainly due to the absence of a precise definition of what constitutes an internal armed conflict allied to a lack of procedural qualification of the conflict has enabled states to deny existence of an armed conflict on their territory or to minimise the scale and the effect of the violence.

¹¹¹² Cullen, ‘the Concept of Non-International Armed Conflict’, *op. cit.*, p. 55.

¹¹¹³ According to the ICRC Commentary on the first Geneva Conventions, this clause ‘makes it absolutely clear that the object of the Convention is a purely humanitarian one, that it is in no way concerned with the internal affairs of states, and that it merely ensures respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself’. Pictet (ed.), *Commentary I*, p. 60.

¹¹¹⁴ The UK Ministry of Defence ‘The Manual of the Law of Armed Conflict’, Oxford U.P., 2004, p. 384.

disinclined to accept these limitations on their sovereignty or the freedom to shape policies to maintain law and order within their territory no where was this tension better manifested than in the adaption of Common Article 3.¹¹¹⁵ On this point, Bothe notes that the tension between unrestrained state discretion and legal limitations of internal violence has been the leitmotif of the development of human rights and humanitarian law.¹¹¹⁶ On the other hand, Cullen notes:

The application of Common Article 3 in particular does not in any way prevent the criminalisation of acts committed by those who take up arms against the state. The use of emergency powers by the state to deal with a situation of insurgency is in no way precluded by the provision provided such measures do not conflict with standards contained therein. A plain reading of the final clause of Common Article 3 makes it clear that the application of this provision has no effect on the legal status of non-state actors and as such does not in any way prevent a *de jure* government from treating them as criminals for their participation in a non-international armed conflict.¹¹¹⁷

In spite of the above, the biggest difficulty which remains is whether a certain situation is an armed conflict of non-international nature or merely a civil strife. In this regard Clapham notes:

The designation of a situation as “armed conflict not of an international character” so as to trigger the application of Common Article 3 to the Geneva Conventions of 1949 is obviously an act of considerable political importance for all sides to the conflict. The insurgents will often welcome the designation of their attacks as constituting armed conflict as this confers a curious sort of international recognition on them; the applicability of Common Article 3 reinforces the special role of the international committee of Red Cross (ICRC). On the other hand the government may be less willing to acknowledge the situation as one of armed conflict, preferring instead to portray it a fight against criminals and terrorists.¹¹¹⁸

Nevertheless, the ambiguity regarding the scope of Article 3 provides states with the opportunity to shirk their responsibility to observe its provisions. No wonder that there is so much reluctance on the part of states to formally recognise existence of ‘armed conflict’ which some equate to the following reasons:

¹¹¹⁵ C. Smith, ‘Common Article 3 of the Geneva Conventions as a Minimum Standard in International Humanitarian Law’ 13 *Israel Law Review* 168 2005, p. 169.

¹¹¹⁶ M. Bothe, ‘Article 3 and Protocol II: Case Studies of Nigeria and El Salvador’, 31 *Am. U. L. Rev.* 899 1981-82.

¹¹¹⁷ Cullen, ‘the Concept of Non-International Armed Conflict’, *op. cit.*, p. 56.

¹¹¹⁸ Clapham, ‘Human Rights Obligations of Non-State Actors in Conflict Situations’, *op. cit.*, pp. 112-13.

First, it highlights the failure of the state in preventing such a situation; second, it is possible for it to contribute to the perceived recognition of insurgents as legitimate combatants; and, third, acknowledging the existence of an armed conflict automatically brings into force the most basic provisions of International humanitarian law, limiting the state's use of repressive measures. These reasons serve as examples to explain states' reluctance to acknowledge the existence of an armed conflict.'¹¹¹⁹

The failure of the drafters to define the term "armed conflict not of an international character" allows reluctant states to accept any international humanitarian obligations simply to deny the existence of an armed conflict, and thus applicability of the IHL regulations.¹¹²⁰ Yet another feature that makes the application of Article 3 challenging, according to the ICRC Commentary on Additional Protocol II, is the phraseology used in some of the provisions, 'lays down the principles without developing them, which has sometimes given rise to restrictive interpretations.'¹¹²¹

Review of state practice reveals that the application of Article 3 is far from automatic.¹¹²² For example the United Kingdom never admitted that Article 3 was applicable in Kenya, Cyprus and Northern Ireland.¹¹²³ By the same token Portugal never admitted any obligation to apply Article 3 to rebel forces in Mozambique and Angola.¹¹²⁴ Turkey, Iraq, Iran have never admitted application of Article 3 to the Kurdish revolts on their respective territories. Similarly, Russia, Pakistan and Sri Lanka never recognised any obligation under Article 3. On the positive note, there have been a few states which accepted the applicability of Article 3 to the hostilities taking place on their territory between their armed forces and rebels.¹¹²⁵ Nonetheless, such cases of compliance by states are very few and far between.¹¹²⁶

¹¹¹⁹ Cullen, 'The Concept of Non-International Armed Conflict', *op. cit.*, p. 56.

¹¹²⁰ Moir, 'The Law of Internal Armed Conflict', *op. cit.*, p. 88.

¹¹²¹ Pilloud, Commentary, p. 1325.

¹¹²² For a review of state practice see Moir, 'the Law of Internal Armed Conflict', *op. cit.*, pp. 67-88.

¹¹²³ In the case of Northern Ireland, the UK gave the benefit of Article 3 to individuals who were prisoners but denied that it had any legal obligation to do so. See T. Meron, 'Humanization of Humanitarian Law', 94 *AJIL* (2000) 239, p. 272. The UK acceded to the Geneva Conventions of 1949 on 23 Sept. 1957 and to Protocols I and II on 28 Jan. 1998 (but with reservation regarding Protocol I's application to national liberation movements). See <http://www.icrc.org/ihl>.

¹¹²⁴ Wilson, 'International Law and the Use of Force by National Liberation Movements', *op. cit.*, p. 47.

¹¹²⁵ According to La Haye, 'express recognition by both parties to a conflict was made in Guatemala in 1955, Algeria in 1956, Cuba in 1958, Lebanon in 1958, the Congo in 1961, the Dominican Republic in 1965, and in the Nigerian civil war in 1967.' E. La Haye, 'War Crimes in Internal Armed Conflicts', *op. cit.*, P. 50.

¹¹²⁶ D.P. Forsyth, Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflict', 72 *AJIL* 274 1978, p. 277.

3.8 1977 Additional Protocols I & II to the Geneva Conventions of 1949

The two Additional Protocols to the Geneva Conventions, were adopted on 8 June 1977 in Geneva by a specially convened Diplomatic Conference.¹¹²⁷ This Conference was supposed to herald a new chapter in the development of the IHL but in reality it did not achieve what it set out to accomplish.¹¹²⁸ The outcome of a series of Diplomatic Conferences on Humanitarian Law held in Geneva from 1974 to 1977 was the two Additional Protocols to the Geneva Conventions which were the product of a long diplomatic struggle.¹¹²⁹ Further, due to the increase in the frequency and intensity of internal armed conflicts, the quest for more elaborate rules governing internal armed conflict gained special impetus.¹¹³⁰ In contrast, international armed conflict occurred relatively infrequently.¹¹³¹ Many international organizations concerned with humanitarian and human rights operations around the world argued that if humanitarian and human rights norms were to be universally respected, they should apply to all the parties engaged in conflict.¹¹³² Hence, it did not matter whether the atrocities were committed by a state or a NSAG, since ultimately the civilian population bore the brunt of suffering.¹¹³³ It is worth noting that apart from common Article 3 that specifically dealt with internal armed conflicts, there were over 20 treaties, declarations and conventions containing over 700 articles were devoted to international armed conflict. This change of paradigm and the numerous lacunae in Common Article 3, prompted the international community to adopt a more comprehensive instrument regulating internal armed conflicts in the shape of Additional Protocol II of 1977 which was to apply to “all parties” involved in a

¹¹²⁷ Protocol I, June 8, 1977, 1125 U.N.T.S. 3; Protocol II June 8, 1977, 1125 U.N.T.S. 609; see also D.P. Forsythe, ‘Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflict’, *op. cit.*

¹¹²⁸ D.M. Miller, ‘The Origin, Development and Negotiation of the Additional Protocol II on Non-International Armed Conflicts’, in Report International Symposium of the Netherlands Red Cross, The Hague, p. 41-48; D.P. Forsythe, ‘The 1974 Diplomatic Conference on Humanitarian Law: Some Observations’, 69 *AJIL* 77 1975; see also W.Y. O’Brien, ‘The *Jus in Bello* in Revolutionary War and Counter-Insurgency’, 18 *Vir. J.I.L.*, 193-242 (1978)

¹¹²⁹ See R.R. Baxter, ‘Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic conference on Humanitarian Law’, 16 *Harv. ILJ* 1 1975.

¹¹³⁰ During the post-war era, between 1945 and 1970, 42 internal armed conflict took place resulting in casualties estimated at between 2.5 million and 4 million combatant and civilians; see further J. Fearon & D. Laitin, ‘Ethnicity, Insurgency and Civil War’, 97 *American Policy Science Review* 75 (2003).

¹¹³¹ During the above period only 11 international armed conflicts had taken place; Sarkees, Meredith, ‘the Correlates of War Data on War: an Update to 1997’, 18 *Conflict Management and Peace Science* 123 (2000); see also K.J. Holsti, ‘The State, War, and the State of War’, Cambridge U.P., 1996, p. 18.

¹¹³² Provost, ‘International Human Rights and Humanitarian Law’, *op. cit.*, p. 4.

¹¹³³ This was especially so in the 1960s as a reaction to conflicts such as the war of Biafra in Nigeria and the problems concerning relief of the conflict prompted many to argue that the provisions regarding internal armed conflict were woefully inadequate; see Cassese, ‘International Law’, *op. cit.*, p. 433.

conflict of non-international nature.¹¹³⁴ For the purpose of this study we concentrate on Additional Protocol I and its significance in relation to NSAGs, in particular, Article 1(4) and its characterization of internal wars of national liberation as international armed conflict.¹¹³⁵ Some scholars are in no doubt that at the time there was a desperate need for a new instrument applicable to non-international armed conflict.¹¹³⁶ Also, Protocol II, at least in theory attempted to widen the scope of the rules regulating internal armed conflict by way of a statement of black-letter law.¹¹³⁷

3.8.1 Additional Protocol I of 1977

3.8.1.1 The emergence of national liberation movements

One of the most distinguishing features of the post-1945 era in international relations was the emergence of national liberation movements (NLM).¹¹³⁸ The term “national liberation movements”¹¹³⁹ evokes a whole set of movements which sought to integrate territorially oriented nationalism with socially reformist themes.¹¹⁴⁰ Emergence of national liberation movements has been described as one of the most distinguishing features in international politics in the twentieth century.¹¹⁴¹ George Abi-Saab in his seminal article regarding the legal status of wars of national liberation says that based on experiences of 18th and 19th

¹¹³⁴ Cullen, ‘Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law’, 183 *Military Law Review* 66 (2005), pp.91-92.

¹¹³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) adopted June 8 June 1977; for text:

<http://www.unhcr.ch/html/menu3/b/93.htm>; see H. McCoubrey, ‘International humanitarian Law: Modern Developments in the Limitation of Warfare’, 2nd ed., Ashgate, Dartmouth, 1998, at 82.

¹¹³⁶ Roberts & Guelff, ‘Documents on the Laws of War’, *op. cit.*, pp. 482.

¹¹³⁷ Schindler & Toman, ‘The Laws of Armed Conflict’, *op. cit.*, p. 775.

¹¹³⁸ For a comprehensive study of Wars of National Liberation, see Abi-Saab, G., ‘Wars of National Liberations in the Geneva Conventions and Protocols’, 165 *Recueil de Cours*, IV, 366-445 (1979); M.N. Shaw, ‘International Status of International Liberation Movement’, 5 *Liverpool Law Review*, 1983, p. 19; R. Ranjeva, ‘Peoples and National liberation Movements’ in ‘International Law: Achievements and Prospects (ed. M. Bedjaoui), Paris, 1991, p. 101.

¹¹³⁹ Natalino Ronzitti, ‘Wars of National Liberation: A Legal Definition’, 1975, *the Italian Yearbook of International Law*, 192-205.

¹¹⁴⁰ For general information on the idea of territorially oriented nationalism, see Eric Hobsbawm, ‘Nations and Nationalism Since 1780’, Cambridge U.P., 1st ed., 1990, pp. 136-38, p.313.

¹¹⁴¹ Cassese notes that “the origins of the term ‘war of national liberation’ could be traced to the early nineteenth century”, A. Cassese, ‘Wars of National Liberation and Humanitarian Law’ in ‘Studies and Essays on International Humanitarian Law and Red Cross Principles: in honour of Jean Pictet’, Swinarski, C., (ed.), International Committee of Red Cross, Martinus Nijhoff Publishers, 1984, pp. 313-324; see also D. Moran & J. Keegan (ed.), ‘Wars of National Liberation’, Harper Collins Publishing, 2006.

century wars of national liberation, they have never been purely internal affairs.¹¹⁴² He cites a series of events in the aforementioned period in which different peoples in search of their statehood embarked upon engaging in such conflicts.¹¹⁴³ The introduction of this category into international law has been described as one of the legal novelties on the aftermath of World War II. On this very point Cassese notes that these struggles were remarkable because firstly, they proliferated so rapidly with great magnitude and intensity, secondly, “national liberation” was no longer merely a political concept but was now given a legal turn by the international community.¹¹⁴⁴

Notwithstanding the fact that initially the international community had retained its traditional bias in favour of established governments and against belligerents.¹¹⁴⁵ By acquiring the status of a party to an international armed conflict a NLM could claim that its members engaged in armed conflict are no longer considered as rebels and they should be recognized as lawful belligerents and consequently granted prisoner of war status.¹¹⁴⁶ The war of independence in Algeria (1954-62), more than any other war of national liberation, contributed to the elevation of such wars to international level.¹¹⁴⁷ From the early days of the conflict, the *Algerian Front de Liberation Nationale (FLN)* had intended to reach an agreement with the French colonial forces regarding the applicability of Common Article 3 to the said conflict.¹¹⁴⁸ However, the French forces refused to recognize the conflict as international in nature and maintained that Algeria was an inseparable part of France in which domestic law and order were applicable.¹¹⁴⁹ This also prompted the ICRC in 1958, as entitled by Common Article 3 to present a draft by which both parties would pledge to observe the provisions of

¹¹⁴² he notes: “... Until well into the 19th century, wars of National liberation were never really considered in practice as a purely internal matter. However, a changing international context and the rise of positivist doctrines of the state both in municipal and international law (i.e., the Hegelian doctrine of the state as ultima ratio, and its will as the only source of law) led, by the end of 19th century to crystallization of the traditional approach.” G. Abi-Saab, ‘The Legal Status of Wars of national Liberation’, 165 *Recueil de Cours*, IV, pp. 366-445, p. 368.

¹¹⁴³ He cites the important role played by France in the American War of Independence as well as the proclamation of the Greek independence by Great Britain, Russia and France after destruction of the Ottoman fleet by the British in Navarino, he point out, however, that what made these wars of national liberation successful was the subsequent recognition of these entities by great powers without which they could not have been able to function as states within the state-centric international community, *ibid*.

¹¹⁴⁴ A. Cassese, ‘Wars of National Liberation and Humanitarian Law’ in ‘Studies and Essays on International Humanitarian Law and Red Cross Principles: in honour of Jean Pictet’, Swinarski, C., (ed.), International Committee of Red Cross, Martinus Nijhoff Publishers, 1984, p. 313.

¹¹⁴⁵ Neff, ‘War and the Law of Nations: A general History’, *op. cit.*, p. 357.

¹¹⁴⁶ Cassese, *ibid*.

¹¹⁴⁷ Reydamas, ‘*A la guerre comme a la guerre: Patterns of Armed Conflict*’, p. 741.

¹¹⁴⁸ Andreoploulos, ‘the Age of National Liberation’, in ‘The Laws of War: Constraints on Warfare in the Western World’, *op. cit.*, pp. 191-213; also on a number of occasions, between 1969 and its accession in 1989 to the 1949 Geneva Conventions, the Palestinian Liberation Organization declared its readiness to abide by Geneva Law, see Meyer, 4 *Interights Bulletin* 13 (1989).

¹¹⁴⁹ J. Norton-Moore, et al., ‘Law and the Civil War in the Modern World’, Johns Hopkins Press, 1974, p. 509.

the said Article 3 which was duly refused by France in the beginning but eventually the French strongly implied that the Article was applied as of June 1956.¹¹⁵⁰

3.8.1.2 Customary status of wars of national liberation

Therefore, armed forces which are engaged in wars of national liberation against racist regimes, colonial domination, and alien occupation in the exercise of their right for self-determination; by virtue of Article 1(4) of Additional Protocol II turn what had traditionally been an important mode of internal armed conflict into an international one.¹¹⁵¹ There can be little doubt that in the context of international law the suggestion that a national liberation movement could use force on behalf of their peoples to realise their self-determination challenges the very principle that only sovereign state can legitimately use force.¹¹⁵² As noted above, the development of the right to self-determination also had a significant impact on the rules governing the conduct of NSAGs, especially, in regards to internal armed conflict.¹¹⁵³ In fact, many scholars consider the development of the right to self-determination and its subsequent application through the process of decolonization in Asia and Africa as a great contributory factor to the re-evaluation of the rules governing internal armed conflict where the so-called national liberation armies challenged the authority of the state.¹¹⁵⁴ According to Higgins, ‘wars of national liberation’ are said to occur when ‘peoples entitled to self-determination take up arms against the governments ruling the territory that they seek to exercise that right’.¹¹⁵⁵ Indeed the term “national liberation movement” encapsulates a whole range of movements that sought to integrate territorially oriented nationalism with social

¹¹⁵⁰ A. Fraleigh, ‘Algerian Revolution as a Case Study in International Law’ in ‘the International Law of Civil War’, R.A. Falk (ed.), The John Hopkins Press, 1st ed., 1971, pp. 179-243, p. 196; See E.V. Greenberg, ‘Law and the Conduct of the Algerian Revolution’, 11 *Harv. Int’l. L. J.* 37 1970, see also ‘the ICRC and the Algerian Conflict’, (International Committee of Red Cross Pamphlet, 1962).

¹¹⁵¹ Such conflicts were granted the juridical status of just war by the majority of the international community R.A. Friedlander, ‘Terrorism and National Liberation Movements: Can Rights Derive from Wrongs?’ 13 *Case Western Reserve Journal of International Law* 281 1981, p. 286.

¹¹⁵² J. Crawford, ‘The Right to Self-Determination in International Law: Its Development and Future’, in ‘People’s Rights’, P. Alston (ed.), Oxford U.P., 1st ed., 2001; Buchheit, L.C., ‘Secession: The Legitimacy of Self-determination’, Yale U.P., New Haven, 1978.

¹¹⁵³ Falk cites the doctrine of self-determination as a major contributory factor to start of many civil wars; hence increasing involvement of many national liberation movements, he notes:

‘...the widespread arousal of political energy in the impoverished and suppressed sections of world society as a result of the collapse of the colonial systems and the spread of a determination to achieve rapid social and economic development have created a series of national situations in which the foundations of traditional government have been badly shaken, making a local battle between the forces of revolution and counterrevolution virtually inevitable.’ Falk, ‘the international Law of Civil War’, *op. Cit.*, p. 1-2.

¹¹⁵⁴ W.G. Werner, ‘Self-Determination and Civil War’ 6 *JCSL* 171 2001.

¹¹⁵⁵ R. Higgins, ‘Problem and Process: International Law and How We Use it’, Oxford: Clarendon Publications, 1st ed., 1994, p.43

reformist themes.¹¹⁵⁶ Hence, the phrase *peoples* featured prominently in 1977 Geneva Additional Protocol I in which the entire provisions of the Geneva Convention 1949 were extended to such movements through Article 1(4) of Additional Protocol I.¹¹⁵⁷ In practice according to Wilson it was the national liberation movements that claimed to have the right to use force on behalf of their ‘people’.¹¹⁵⁸ However the term “peoples” which had started its life as a vague concept in the aspirational provisions of the U.N. Charter to a term guaranteeing legal protection in the use of force of the kind that traditional international law had reserved only for sovereign states.¹¹⁵⁹

However, the biggest problem facing the international community that still persists is what constitutes a *genuine* national liberation movement from a separatist movement undermining the legitimacy and political power of an independent sovereign state using a legalistically determinist argument of self-determination.¹¹⁶⁰ In the intervening years between the 1949 Geneva Conventions and its two Additional Protocols of 1977, the General Assembly of the UN had tried to address the issue of national liberation movements through Resolution 3103 (XXVIII) of December 1973, a more general nearly legislative resolution on the legal status of combatants engaged in struggles of national liberation against colonial and alien domination and racist regimes.¹¹⁶¹ The most telling part of this resolution was paragraph 3, which in affect removed such armed conflicts from the purview of Common Article 3 of Geneva Convention 1949 creating a new category of conflicts assimilated to interstate armed conflicts.¹¹⁶² With the doctrine of self-determination placed at the center of international political agenda, NSAGs engaged in wars of national liberation would also come very closely to being perceived as a “power”, providing they represented the aspirations of their peoples’

¹¹⁵⁶ On the concept of territorially oriented nationalism, see ‘Eric Hobsbawm, ‘Nations and Nationalism since 1780’, Cambridge U.P., 1st ed., 1990, pp.136-138

¹¹⁵⁷ The words *emancipation* and *peoples* became the embodiment and vignette of such national liberation movements. See E.B. Firmage, ‘The War of National Liberation and the Third World’, in ‘Law and Civil War in the Modern World’, John N. Moore (ed.), The Johns Hopkins U.P., 1974, pp. 304-347.

¹¹⁵⁸ Wilson, ‘International Law and the Use of Force by National Liberation Movements’, *op. cit.*, p. 91.

¹¹⁵⁹ I. Brownlie, ‘International Law and the Use of Force by States’, Oxford U.P., 1st ed., 1963; see C. Gray, ‘International Law and the Use of Force’, Oxford U.P., 3rd ed., 2008.

¹¹⁶⁰ Tamilnation website devoted to the Tamil Tigers, a NSAG operating in northern Sri Lanka is one of the best contemporary examples of this opposing view between a state and an insurgent movement operating on its soil. The website advocates that Tamil population has an inherent right to self-determination and devotes a section to elucidation of the right of Tamil population to self-determination. Tamil-nation: <http://www.tamilnation.org/selfdetermination/tamileelam/8300balasingham.htm>

¹¹⁶¹ See G. Abi-Saab, ‘Wars of National Liberation in the Geneva Conventions and Protocols’, *op. cit.*, pp. 257.

¹¹⁶² Reprinted in Schindler & Toman, ‘Laws of Armed Conflict’. *op. cit.*, pp. 602-603.

right to self-determination.¹¹⁶³ Such developments eventually led to internationalization of wars of national liberations and brought the whole *jus in bello* to apply.¹¹⁶⁴

Nonetheless, the very issue was dealt with more comprehensively under Article 1(4) of 1977 Additional Protocol I to the Geneva Conventions of 1949 which promoted wars of national liberation to international level.¹¹⁶⁵ Therefore, by virtue of the said Article, an armed conflict involving peoples in pursuit of their self-determination¹¹⁶⁶ enshrined in the Charter of the United Nations and the Declaration on Principles of international Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations is considered an international armed conflict.¹¹⁶⁷ Nonetheless, some observers note that to codify wars of national liberation was not on the basis of their status under international law but rather the impetus behind it was fundamentally political.¹¹⁶⁸

3.8.1.3 Drafting history of Article 1(4) of Additional Protocol I

As noted above, the most conspicuous aspect of this was promotion of one particular group of insurgents from humble rebels operating in countries under colonial domination to fully-fledged belligerents; representing what became commonly known as ‘national liberation struggle’.¹¹⁶⁹ Initially, this development did not receive universal approval from international lawyers, some of whom were of the opinion that a dangerous precedent had been set against

¹¹⁶³ R.J. Tyner, ‘Wars of National Liberation in Africa and Palestine: Self-Determination for Peoples or for Territories’, 5 *Yale Stud. World Pub. Ord.*, 234, 1978-79.

¹¹⁶⁴ A. Cassese, ‘Wars of National Liberation and Humanitarian Law’ in ‘Studies and Essays on International Humanitarian Law and Red Cross Principles: in honour of Jean Pictet’, C. Swinarski (ed.), ICRC, Martinus Nijhoff Publishers, 1984, pp. 313-324, p. 313.

¹¹⁶⁵ It has been observed that wars of national liberation are international in nature because a war of national liberation is defined by its very goal the implementation of a recognized right of self-determination in the UN Charter, R.E. Gorelick, ‘Wars of National Liberation: Jus Ad Bellum’, 11 *Case W. Res. J. Int’l L.* 71 1979, p. 71.

¹¹⁶⁶ See A. Cassese, ‘Self-Determination of Peoples: A Legal Reappraisal’, Cambridge U.P., 2nd ed., 1996; D. Thurer, ‘Self-Determination’, in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. IV (Amsterdam, North Holland, 2000), p. 367.

¹¹⁶⁷ Articles 1(2) and 55 of the United Nations Charter; also see *inter alia* the General Assembly Res. 1514 (XV) of 1960, ‘the Declaration on Granting of Independence to Colonial Countries and Peoples’ which says: “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” The Article 1 of both International Covenants on Human Rights provides that ‘all peoples have the right to self-determination’. Hence, they have the right to freely determine their political status and freely pursue their economic, social and cultural developments. This view was further reinforced by the Article 20 of the African Charter on Human Rights which stipulated that ‘all peoples shall have the right to existence as well as the unquestionable right’ to self-determination.

¹¹⁶⁸ Cullen, ‘The Concept of Non-International Armed Conflict’, *op. cit.*, p. 83.

¹¹⁶⁹ Shaw, ‘International Status of International Liberation Movement’, *op. cit.*, pp. 19-34.

the very realm of what the foundations of international law was based upon, interstate relations.¹¹⁷⁰ Others heralded this as a welcome extension to the ‘just war’ principles.¹¹⁷¹

In fact, the Diplomatic Conference responsible for drafting of the Additional Protocols extensively debated the issue of extending the applicability of the Geneva Conventions to wars of national liberations.¹¹⁷² The inclusion of such conflicts to international level has also been criticised by many scholars for mixing up *ius ad bellum* and *ius in bello*.¹¹⁷³ In fact, the American administration at the time was very vociferously critical of the abovementioned Article 1(4) since it deemed it as harmful because by internationalizing wars of national liberation on the basis of perceived ‘just’ nature. It argued, that this would provide immunity from prosecution for belligerent acts committed by groups such as Palestinian Liberation Organization (PLO) that often resort to terrorism, consequently enhance their status ‘to the detriment of the civilized world community’.¹¹⁷⁴ This approach adopted by the US government was a reflection of tension between it and some of the third world countries supported by the USSR which had managed to accord observer status for some of the national liberation organizations to attend the conference.¹¹⁷⁵ One of the best illustrations of this approach in support of militias and guerrilla fighters in wars of national liberation was the statement delivered by the representative of the People’s Republic of China:

People’s militia and guerrilla fighters in wars of national liberation should be protected, since they were basically civilians who had been forced to take up arms in self-defence

¹¹⁷⁰ Neff, ‘War and the Law of Nations: A general History’, *op. cit.*, p. 373.

¹¹⁷¹ Chadwick has gone as far as saying that although normally taking up of arms against a state is illegal but in the pursuance of achieving self-determination against a Colonial, racist or alien government the so-called national liberation armies should see their struggle elevated to international armed conflict status, E. Chadwick, ‘Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict’, The Hague: Nijhoff, 1st ed., 1996; see also A.J. Armstrong, ‘Mercenaries and Freedom Fighters: The Legal Regimes of the Combatant under Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)’, 30 *JAG J.* 125 (1978); H. McCoubrey & N.D. White, ‘International Organizations and Civil War’, Dartmouth Publishers, 1st ed., 1995, pp. 31-54.

¹¹⁷² For a comprehensive assessment of arguments for and against the internationalization of wars of national liberation see Cullen, ‘The Concept of Non-International Armed Conflict’, *op. cit.*, p. 69-79.

¹¹⁷³ A message from the President of the United States Regarding Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-international Armed Conflicts, Message from the President of the United States, US Government Printing Office, 100th Congress, 1st Session, Treaty Doc. 100-2, Washington D.C., 1987; Douglas J. Feith, ‘Law in the Service of Terror’ (1985) *The National Interest* No. 1 at 47.

¹¹⁷⁴ See ‘The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Advisor, United States Department of State, January 22, 1987, 2 *American University Journal of International Law & Policy* 460 1987; contrast that to the position adopted by UK Ministry of Defence Manual of the Law of Armed Conflict which states that Article 1(4) of Protocol I: “conflicts of this nature within the territory of a state had hitherto been regarded as internal. Under the Protocol, such conflicts are treated as if they were international armed conflict.”, UK Ministry of Defence *Manual*, *op. cit.*, p. 29.

¹¹⁷⁵ J.G. Gardam, ‘Non-Combatant Immunity as a Norm of International Humanitarian law’, Martinus Nijhoff Publishers, 1993, p. 87; see also the text of the Resolution approving the participation of NLMs, *Official Records*, vol. CDDK/55, p. 5.

against imperialist repression in order to win independence and safeguard their right to survival. When not participating directly in military operations, members of people's militia or guerrilla movements should have civilian status and benefit from the protection granted to civilians.¹¹⁷⁶

On this point Moir opines that classifying armed conflict according to the objective of parties was at the time highly controversial but maintains that now such conflict should be regulated under the whole body of international humanitarian law since Article 1 of the Additional Protocol II accepts that the abovementioned conflicts are beyond its scope of application.¹¹⁷⁷ But an alternative opinion has been suggested since then such conflict should have been contained under Additional Protocol II rather than Protocol I.¹¹⁷⁸ It is also important to note that Additional Protocol I, does not apply to all wars of national liberation due to its limited scope.¹¹⁷⁹

3.8.1.4 Scope of application of Article 1(4) of Additional Protocol I

Article 1(4) considers as “international armed conflict” situations which include:

Armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations Co-operation among States in accordance with the Charter of the United Nations.¹¹⁸⁰

The term “armed conflict” in regard to wars of national liberation has not been clarified anywhere in Protocol I and it is not clear whether any threshold condition is attached to it.¹¹⁸¹

In this regard Greenwood states, ‘although that term is nowhere defined, it implies a certain level of intensity going beyond isolated acts of violence. Thus the Red Brigade, Action Directe, the Baader-Meinhof Gang and groups of that kind fall wholly outside the scope of

¹¹⁷⁶ Chinese Statement, Official Records, Meeting of Committee III, CDDH/III/SR.7, 135-136, [54] (1974).

¹¹⁷⁷ Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p.90

¹¹⁷⁸ G.I.D.A., Draper, ‘Wars of National Liberation and War Criminality’ in Michael Howard (ed.), in ‘Restraints on War’, Oxford U.P., 1979, p.135

¹¹⁷⁹ N. Higgins, ‘Regulating the Use of Force in Wars of National Liberation: the Need for a New Regime’, Martinus Nijhoff Publishers, 2010, p. 112.

¹¹⁸⁰ Schindler & Toman, ‘The Laws of Armed Conflicts’, *op. cit.*, p.621 ; See Article 96(3) of Additional Protocol I in regards to its application and that of the 1949 Geneva Conventions to such conflicts.

¹¹⁸¹ Higgins, ‘Regulating the Use of Force in Wars of National Liberation’, *op. cit.*, p. 112.

the provision on this ground alone.¹¹⁸² Article 1(4) only applies if the national liberation movement has a level of organisation which represents the ‘peoples’ engaged in the armed conflict as well as to declare an undertaking to apply the Geneva Conventions as well as Additional Protocol I.¹¹⁸³

In regards to application of Protocol I to wars of national liberation one of the categories listed in Article 1(4) has to be satisfied namely; ‘colonial domination’, ‘alien occupation’, and ‘racist regimes’. But the meaning of the said terms are not defined by the provisions of the drafters, although, the scope of each classification is of particular importance in determining the issue of applicability.¹¹⁸⁴ As noted by Green, ‘neither the Protocol nor Declaration on Friendly Relations makes any provisions for determining what movement is seeking self-determination and thus qualified as a national liberation movement. Neither does either instrument offer any assistance in determining whether a country is self-governing or part constitutes a people.’¹¹⁸⁵ Since in the absence of any definition that would set out the scope of application of Article 1(4), the Commentary on the two Additional Protocols interprets the three categories of armed conflict as: ‘the expression ‘colonial domination’ certainly covers the most frequently occurring case in recent years, where a people has had to take up arms to free itself from the domination of another people; it is not necessary to explain this in greater detail here. The expression ‘alien occupation’ in the sense of this paragraph – as distinct from belligerent occupation in the traditional sense of all or part of the territory of one state being occupied by another state – covers cases of partial or total occupation of a territory which has not been fully formed as a state. Finally, the expression ‘racist regimes’ covers cases of regimes founded on racist criteria. The first two situations imply the existence of distinct peoples. The third implies, if not the existence of two completely distinct peoples, at least a rift within a population which ensures hegemony of one section in accordance with racist ideas. It should be added that a specific situation may correspond simultaneously to two of the situations listed, or even with all three.’¹¹⁸⁶ This interpretation by the ICRC Commentary is an attempt to limit the meaning of the said terms. According to Aldrich:

¹¹⁸² C. Greenwood, ‘Terrorism and Humanitarian Law: the Debate over Additional Protocol I’, 19 *Israel Yearbook of Human Rights* (1989), pp. 187-207, p. 193.

¹¹⁸³ In accordance with AP I, Art. 96(3).

¹¹⁸⁴ Cullen, ‘The Concept of Non-International Armed Conflict’, *op. cit.*, p. 83.

¹¹⁸⁵ Green, ‘Law of Armed Conflict’, *op. cit.*, p. 63-64.

¹¹⁸⁶ Y. Sandoz et al. (ed.), *Commentary on the Additional Protocols of 8 June to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), p. 54, para. 112.

Paragraph 4 of Article 1 was designed by its sponsors with certain conflicts in mind, especially those in Palestine and South Africa, and was drafted in terms fashioned to exclude its application to civil wars within existing states. That is why it uses emotionally loaded terms like “colonial domination”, “alien occupation” and “racist regimes”; indeed, the use of these terms goes far to ensure that the provision will never be applied.¹¹⁸⁷

There are other scholars that interpret this Article in a more expansive way that, ‘as long as an internal conflict is directed towards self-government, the Protocol provides for its recognition as an international conflict governed by the Conventions and the Protocol, as well as the ordinary law regarding international armed conflict.’¹¹⁸⁸ One of the main consequence of inclusion of such armed conflicts to Protocol I is the application of international humanitarian norms that ultimately benefit the victim of such conflicts.¹¹⁸⁹ In contrast to Protocol II in which control of a part of the territory is a precondition, the control of territory proviso is not included in Article 1 of Additional Protocol I, which means that forces involved in national liberation movements could operate outside the territory for which they are striving to achieve their self-determination. The African National Congress (ANC) fighting the apartheid regime in South Africa was a case in point.¹¹⁹⁰

3.8.1.5 Provisions for application: Article 96 (3)

The role played by Article 96 of the Additional Protocol I is to clarify any uncertainties and limitations which may result from the application of Article 1(4) to wars of national liberation as well as allowing them to apply and be bound by the Conventions and the said Protocol.¹¹⁹¹

It states:

1. When the Parties to the Conventions are also parties to this Protocol, the Convention shall apply as supplemented by this Protocol.
2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall

¹¹⁸⁷ G.H. Aldrich, ‘Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions’, 85 *AJIL* 1 (1991), pp. 6-7.

¹¹⁸⁸ L. Green, “Strengthening Legal Protection in Internal Conflicts: Low Intensity Conflict and the Law”, 3 *ILSA J. Int’l & Comp. L.* 493 (1997), p. 503.

¹¹⁸⁹ Cullen, ‘The Concept of Non-International Armed Conflict’, *op. cit.*, p. 834.

¹¹⁹⁰ Kwakwa, ‘The International Law of Armed conflict’, *op. Cit.*, p. 79.

¹¹⁹¹ S. Rosenne, ‘An International Law Miscellany’, Springer, 1st ed., 1993, p. 436.

furthermore be bound by this Protocol in relation to each of the parties which are not bound by it, if the latter accepts and applies the provisions thereof.

3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this protocol in relation to that conflict by means of unilateral declaration addressed to the depository. Such declarations shall, upon receipt by the depository, have in relation to that conflict the following effects:
 - a) The Conventions and this Protocol are brought into force for the said authority as a party to the conflict with immediate effect;
 - b) The said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
 - c) The Conventions and this Protocol are equally binding upon all parties to the conflict.

As pointed out by the ICRC, this provision places groups' fighting for national liberation in a "fundamentally different legal position from insurgents in a non-international armed conflict."¹¹⁹² In other words, this elevates the status of various liberation movements to state or quasi-state.¹¹⁹³ Article 96, somewhat surprisingly gives states (through ratification) and also national liberation movements "the right to choose whether or not to submit to international humanitarian law", at least "insofar as it goes beyond customary law".¹¹⁹⁴ On this point Abi-Saab opines:

... The fact that the *locus standi* of liberation movements was codified in Article 96, paragraph 3, vindicates the earlier interpretation of the term "power" in the Conventions to include such movements, at least for the purposes of common Article 2, paragraph 3, of the conventions, whose formula was more or less borrowed by Article 96 of the Protocol.¹¹⁹⁵

However, eligibility of the authority claiming to represent the people must meet other conditions set out in Article 96(3) and other provisions of Additional Protocol I. First, the

¹¹⁹² Sandoz, *et al.*, 'Commentary on the Additional Protocols', *op. cit.*, para 3765, pp. 1090-1091.

¹¹⁹³ T. Meron, 'The Time Has Come for the United States to Ratify Geneva Protocol I', *AJIL* 678 1994, p. 7678; in contrast G.B. Robert, 'The New Rules for Waging War: The Case Against Ratification of Additional Protocol I', 26 *Va. J. Int'l L.* 109 1985-1986; see also The Position of the United States 'On Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Advisor, United States Department of State, January 22, 1987', 2 *American University Journal of Law and Policy* 460 1987.

¹¹⁹⁴ Sandoz, *et al.*, 'Commentary on the Additional Protocols', *op. cit.*, para 3765, pp. 1090-1091.

¹¹⁹⁵ Abi-Saab, 'Wars of National Liberations in the Geneva Conventions and Protocols', *op. cit.*, p. 433.

NSAGs must represent the people and the fact that there has been a continuance armed conflict for a prolonged period of time.¹¹⁹⁶ Secondly, the NSAG claiming to be a national liberation force must be an organized armed force as described in Article 43 of Protocol I, as well as being under responsible command and to have an internal disciplinary system which enables it to comply with humanitarian law.¹¹⁹⁷

It is clear that paragraph 3 of the above Article enables the authority representing the peoples struggle against the colonial, alien, or racist party to make a unilateral declaration to the depository (the Swiss Federal Council) to undertake to apply the Conventions and the Protocol.¹¹⁹⁸ This can only take place under the proviso that the conditions stipulated in Article 1(4) are met, i.e. (a) there must be an armed conflict where a people are fighting for self-determination against colonial domination, alien occupation and racist regimes, and (b) the armed conflict must be between such a people and a party to the Protocol. As stated above, this authority must then make a declaration to the depository which will in turn notify the other parties to the Conventions.¹¹⁹⁹ However, Greenwood has noted that no successful declaration has ever been deposited mainly because states most likely to be affected by Article 1(4) are not parties to the said Protocol.¹²⁰⁰ Throughout the 1980s and 90s states such as South Africa and Israel strenuously resisted any application of Additional protocol I in relation to the African National Congress (ANC) and Palestinian Liberation Organization (PLO).¹²⁰¹

However, efforts for codification and regulation of wars of national liberation in 1977, and in order to elevate such conflicts to international armed conflicts level was met with tangible opposition from sovereign states and major powers, in particular the US.¹²⁰² In fact, there was little agreement in relation to the appropriate scope of self-determination which in turn made the right to self-determination and the right to use force to achieve it unworkable

¹¹⁹⁶ Wilson, 'International Law & the Use of Force by NLM', *op. cit.*, p. 169.

¹¹⁹⁷ Higgins, 'Regulating the Use of Force in Wars of National Liberation', *op. cit.*, p. 117-118.

¹¹⁹⁸ See D.I.A.D. Draper, 'Wars of National Liberation and War Criminality', in 'Restraints on War: Studies in the Limitations of Armed Conflict', Howard, M. (ed.), Oxford U.P., 1979, pp. 158-9.

¹¹⁹⁹ Additional Protocol I, Article 100(d)

¹²⁰⁰ C. Greenwood, 'Customary Law Status of the 1977 Additional Protocols', in 'Humanitarian Law of Armed Conflict Challenges Ahead', *op. cit.*, p. 112; for the view of the US on the Additional Protocol I see: Aldrich, 'Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions', *op. cit.*,

¹²⁰¹ C. Murray, 'The 1977 Protocol and Conflict in South Africa', 33 *ICLQ* 462 (1984); N. Bar-Yaacov, 'Some Aspects of Prisoner-Of-War Status according to the Geneva Protocol I of 1977', 20 *Israel Law Review* 243 1985.

¹²⁰² Chadwick, 'Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict', *op. cit.*, p. 29; for an examination of state practice Cassese, 'Self-Determination of Peoples: A Legal Reappraisal', *op. cit.*, p. 90-99.

concepts.¹²⁰³ As it has been noticed elsewhere it is debatable whether wars of national liberation could still take place with the apparent end of the process of decolonization, although in spite of the near-completion of decolonization, the issue is not obsolete.¹²⁰⁴ It has been noticed that once the last remains of European colonialism has disappeared then the provisions on wars of national liberation will probably not be relevant anymore.¹²⁰⁵ On the other hand, until there is a universal ratification of Protocol I, or Article 1(4) enters into customary law, or key states such as the United States and Israel ratify it, there is little hope of dissipating the force of those objections.¹²⁰⁶ Given the *erga omnes* character of the right of self-determination as a fundamental international concern any forcible denial of such a right by states would be construed as oppression in international law.¹²⁰⁷ Nevertheless, states are very reluctant to accept a form of international legislation which might eventually undermine their own legitimacy or power structure.¹²⁰⁸

On the unlikely event that a national liberation movement's struggle is being recognized by a state party to the Protocol, members of such armed organization unlike insurgents are not at the mercy of that state's criminal law regime, since according to Articles 43 and 44 of Protocol I they will be granted combatant and prisoner of war status.¹²⁰⁹ Indeed, at the sharp end of this issue is the perennial dichotomy of one man's terrorist is another man's freedom fighter, a general discourse very much born out of the Cold War period. In spite of the near-completion of decolonization, the issue of self-determination is not obsolete, since there still remain territories such as Palestine, the Western Sahara, and Tibet as well as other territories around the world where numerous claims to self-determination on the basis of ethnic and other group identity still persists.¹²¹⁰

¹²⁰³ Chadwick, *ibid.*

¹²⁰⁴ Detter, 'The Law of War', *op. cit.*, p. 33. There are 16 remaining non-self governing territories: 'UN Decolonization panel calls for Cooperation with Visiting Missions', UN News Service, New York, 3 June 2003.

¹²⁰⁵ Schindler, 'Different Types of Armed Conflicts According to the Geneva Conventions & Protocols', *op. cit.*, p. 144.

¹²⁰⁶ B. Saul, 'Defining Terrorism in International Law', Oxford U.P., 2006, p. 77.

¹²⁰⁷ *Israel Wall Advisory Opinion*, *op. cit.*, paras 88, 155-156; *East Timor case (Portugal v Australia)* (1995) ICJ Reports 102, para 29.

¹²⁰⁸ Cassese, 'International Law in a Divided World', *op. cit.*, p. 92.

¹²⁰⁹ See C. Greenwood, 'A Critique of the Additional Protocols to the Geneva Conventions of 1949', in 'The Changing Face of Conflict and the Efficacy of International Humanitarian Law', *op. cit.*, p. 16.

¹²¹⁰ Saul, 'Defining Terrorism in International Law', *op. cit.*, p. 75.

3.8.1.6 State practice related to Article 1(4)

It is now universally accepted that wars of national liberation would be regulated by IHL in its entirety. However, application of Article 1(4) of the Additional Protocol I is fraught with complications. Some scholars are of the opinion that due to: ‘Considerable body of opposition in state practice to treating such conflict, for the purposes of *jus in bello*, as though they were conflicts between states suggests that Article 1(4) went well beyond customary law as it stood in 1974 and has not met the criteria for being absorbed into customary international law since its inclusion in Protocol I.’¹²¹¹

Indeed, in recent decades this has become more complicated with the growth of ‘post-modern tribalism’ which the said legitimacy has increasingly been challenged.¹²¹² Werner notes that although the process of decolonization has almost come to an end, by relying on recent state practice, international conventions and jurisprudence, self-determination has been reiterated as a right of all peoples.¹²¹³ In the last few decades the international Committee of Red Cross has attempted to reform the IHL to encompass the conduct of armed opposition and national liberation forces. However due to lack of a credible compliance framework it has failed to ensure that such NSAGs have any incentive to comply with the laws of armed conflict. There is also a great deal of reluctance by sovereign states to admit the applicability of the Geneva Convention or specifically Additional Protocol I in relation to national liberation movements fearful of recognizing NSAGs operating on their territory which they consider as “terrorists”. The states concerned are mindful of the fact that by recognizing these groups they would ultimately encourage them to claim that they are engaged in internationally recognized armed struggle and no longer come under the ambit of the national criminal law mechanism. The states’ concern is reflected in the list of non-parties to Protocol one which include: India, Sri Lanka, Pakistan, Nepal, Myanmar, Iran Iraq, Turkey, Israel, Indonesia, the Philippines, Malaysia, Singapore, Morocco, and the last but not least the United States.¹²¹⁴ It is worth

¹²¹¹ C.J. Greenwood, ‘Customary Law Status of 1977 Additional Protocols’ in ‘Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honor of Frits Kalshoven’, Delissen, A.J.M. and Tanja, G.J. (ed.), Martinus Nijhoff Publishers, 1st ed., 1991, p 112.

¹²¹² T. Frank, ‘Post-Modern Tribalism and the Right to Secession’, in C. Brölmann et al. (ed.), ‘Peoples and Minorities in International Law’, Brill Academic Publishers, 1993, p. 3.

¹²¹³ W.G. Werner, ‘Self-determination and Civil War’, 6 *JCSL* 171, 2001, pp. 171-172; for an example of state practice see United Kingdom state practice regarding self-determination in ‘United Kingdom Materials on international Law’, *BYIL* (1995) 283-331; Vienna Declaration and Programme on Actions on human rights also reiterated the right of peoples to self-determination.

¹²¹⁴ For the legal position of the United States see A.D. Sofaer, ‘Terrorism and the Law of War’, 64 *Foreign Affairs* 901 (1986), p. 912; see also G.B. Roberts, ‘The New Rules for Waging war: the case against Ratification of Additional Protocol I’, 26 *Virginia Journal of International Law* 109 (1985).

noting that most of the abovementioned states are either currently embroiled in or potentially could be involved in an internal armed conflict.¹²¹⁵

More often than not, a national liberation movement would argue that, usually, their armed organisations would act against a repressive government that has denied them the right to self-determination, a norm of *jus cogens* in international law.¹²¹⁶ The government of the state in question on the other hand would argue that they are entitled to safeguarding their territorial integrity and can theoretically use any force short of genocide to protect its territory from fragmentation.¹²¹⁷ The above arguments also perfectly highlight the two competing principles of territorial integrity and self-determination in the sphere of contemporary international law.¹²¹⁸

3.8.2 Additional Protocol II of 1977¹²¹⁹

3.8.2.1 The drafting history of Additional Protocol II

There is no doubt that at the time there was a desperate need for a new instrument applicable to non-international armed conflict since, ‘experience demonstrated the inadequacy of the common article. While its provisions do extend certain fundamental humanitarian protection to non-combatants, they do not provide any definitive codification of the laws of war for non-international armed conflicts. Moreover, the provisions are so general and incomplete that they cannot be regarded as an adequate guide for the conduct of belligerents in such conflicts’.¹²²⁰

At the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict which took place in 1974 to 1977, the

¹²¹⁵ M. Boothe, ‘Customary International Humanitarian Law: Some Reflections on the ICRC Study’, *YIHL*, Vol. 8, 2005, pp. 143-178, p. 148.

¹²¹⁶ See Brownlie, ‘Principles of Public International Law’, p. 581, cites the Advisory Opinion of the International Court relating to the *Western Sahara* [ICJ Reports (1975) 12 at 31-3], and more recently in the case concerning the Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory [ICJ Reports (2004), 136 at 171-2], as authority for confirming the right of self-determination as a legal principle of international law.

¹²¹⁷ J. Castellino, ‘International Law and Self-Determination’, Martinus Nijhoff Publishers, 1st ed., 2000, p. 102.

¹²¹⁸ For an assessment of Self-Determination v Territorial Integrity, see L. Brilmayer, ‘Secession and Self-Determination: A Territorial Interpretation’, 16 *Yale JIL*, 1991, 177; J. Castellino, ‘Territorial Integrity and the right to Self-Determination: An Examination of the Conceptual Tools’, 33 *Brook. JIL* 503 2007-2008.

¹²¹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977; for text: <http://www.icrc.org/ihl.nsf/INTRO/475>

¹²²⁰ Roberts & Guelff, ‘Documents on the Laws of War’, *op. cit.*, pp. 482.

ICRC representative Daniele Louise Bujard observed that there was a need for further development of the law governing of internal armed conflict:

When put to the test ... the rules of protection in [common] Article 3 had been shown to require elaboration and completion. Government and Red Cross experts consulted by the ICRC since 1971 had confirmed the urgent need to strengthen the protection of victims of non-international armed conflicts by developing international humanitarian law applicable in such situations.¹²²¹

The intention of the drafters of Additional Protocol was to expand on the protection already contained in Common Article 3 which “needed to be confirmed and clarified”.¹²²² It is quite clear that the drafters had two different types of non-international armed conflict in mind. On the one hand, major civil wars such as in Spain in the 1930s and on the other, more “contained” civil wars of Nigeria and the Congo in the 1960s.¹²²³ Baxter notes:

Through this definition two levels of internal armed conflicts were created, even as to both parties to both Conventions of 1949 and Protocol II – the lower level, governed by Article 3, and the higher level, governed by Protocol II. Such nice legal distinctions do not make the correct application of the law any easier.¹²²⁴

The evolutionary process of Additional Protocol II very much mirrored the events of 1949.¹²²⁵ In fact, the original proposal was a lot more comprehensive than the text that was eventually agreed upon in the Diplomatic Conference.¹²²⁶ Some Scandinavian delegates in the Diplomatic Conferences prior to the adoption of the two Additional Protocol favoured implementation of a single protocol applicable to all types of armed conflicts hence removing the traditional dichotomy between international and non-international armed conflicts as well as bypassing the difficulty surrounding classification of situations.¹²²⁷ This view also

¹²²¹ *Official Records*, vol. VIII, CDDH/I/SR.22, p. 201; Cullen, ‘the Concept of Non-International Armed Conflict in International Humanitarian Law’, *Op. Cit.*, p. 86; Moir, ‘the Law of Internal Armed Conflict’, *op. cit.*, p. 89.

¹²²² Sandoz, *et al.*, ‘Commentary on Additional Protocols’, *op. cit.*, p. 1325.

¹²²³ Solis, ‘the Law of Armed Conflict’, *op. cit.*, p. 129.

¹²²⁴ R.R. Baxter, ‘Modernizing the Laws of War’, 78 *Military L. R.* 165 (1978), p. 172.

¹²²⁵ See generally D.E. Graham, ‘The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and Return to the ‘Just War’ Concept of the Eleventh Century’, 32 *Washington & Lee Law Review* 25 (1975).

¹²²⁶ Cassese, ‘A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict’, in the ‘New Humanitarian Law of Armed Conflict’, Cassese (ed.), *op. cit.*, p. 426.

¹²²⁷ Edvard Hambro, the Head of the Norwegian Delegation stated that his government: “believed that all war victims should be protected, whatever the political or legal classification of the conflict. For that reason, the Norwegian experts had proposed, at the meeting of experts organized by the ICRC, that there should only be one additional protocol applicable to all armed conflicts.”; *Official records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 1974-1977, Volumes 5-6, CDDH/SR.10, p. 91; This view was also supported by the Swedish delegation, *ibid*, *Official Records*, vol. 5-6, CDDH/SR.14, p. 142.

attracted some support from third world states.¹²²⁸ As stated above, the notion of having a uniform body of international humanitarian law had been discussed briefly in the Diplomatic Conference which drafted the Geneva Conventions of 1949. As in the case of the Diplomatic Conference which drafted the Geneva Conventions of 1949, ‘support for realisation of this approach was lacking due to concern about its impact on state sovereignty.’¹²²⁹

For one thing, it counts for only 28 articles (in contrast to the 102 articles of Additional Protocol I, and for another most of its provisions are copies of provisions in Additional Protocol I. Furthermore, without breaking new grounds Protocol II makes the law more specific.¹²³⁰ Additional Protocol II according to Greenwood: ‘goes a long way to putting flesh on the bare bones of Common Article 3 of 1949 GC. In particular, Additional Protocol II contains the first attempt to regulate by treaty the methods and means of warfare in internal conflicts’.¹²³¹ A view shared by George Abi-Saab, he notes, ‘a much greater, and greatly needed, elaboration of the elliptic declarations of principles of Common Article 3, and through introducing new fundamental rules concerning the protection of civilians against the effects of hostilities, as well as the protection of medical personnel and transport.’¹²³²

3.8.2.2 The intended scope of Additional Protocol II

In step with Common Article 3, Additional Protocol II has no provisions regarding methods and means of the warfare other than Article 4(1), which states that, ‘it is prohibited to order that there shall be no survivor’.¹²³³ A distinct feature of the Protocol II is that it has an almost exclusively content.¹²³⁴ Protocol II, adopted an entirely new approach to internal armed conflict, in contrast to Common Article 3, Additional Protocol II deploys the terms ‘civilian’ and ‘civilian population’ in its text but does not define the term.¹²³⁵ It also abolished the

¹²²⁸ The Syrian delegate stated that ‘it was unfortunate that there were two draft Protocols, providing for two kinds of treatment. But surely humanitarian law was concerned with man; why then should there be two sets of rules? There was no excuse for this kind of differentiation.’ Official Records, vol. 5-6, CDDH/SR. 18, p. 193.

¹²²⁹ Cullen, ‘the Concept of Non-International Armed Conflict’, *op. cit.*, p. 89.

¹²³⁰ Robert & Guelff, ‘Documents on the Laws of War’, *op. cit.*, pp. 481.

¹²³¹ C. Greenwood, ‘A Critique of the Additional Protocols to the Geneva Conventions of 1949’, In H. Durham, & L.H. McCormack (ed.), ‘The Changing Face of Conflict and the Efficacy of International Humanitarian Law’, Martinus Nijhoff Publishers, 1999, pp. 3-22, p. 14.

¹²³² ‘ICRC Commission of Experts for the Study of the Question of Aids to the Victims of Internal Conflict’, as cited in G. Abi-Saab, ‘Non-International Armed conflicts’, in ‘International Dimensions of Humanitarian Law’, Institute Henry Dunant, UNESCO, 1988, p. 225.

¹²³³ To an extend Articles 13-18, which sets out the protection of the civilian population, including the obligation not to launch attacks against the civilian population or against civilian objects.

¹²³⁴ Cassese, ‘The Status of Rebels under the 1977 Geneva Protocol’, *op. cit.*, pp. 418-19.

¹²³⁵ Additional protocol II, Article 5(1)(b) and (e) and Part IV (Articles 13-18).

distinction between regular and irregular armed forces and provided that ‘the armed forces, groups and units that are under a command responsible for its subordinates’.¹²³⁶

Article 1(2) of Additional Protocol II also reiterates that “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature” do not amount to an armed conflict.¹²³⁷ In this regard the Commentary of Additional Protocol II states that the term “armed conflict” should only be used where “the existence of open hostilities between armed forces which are organized to a greater or lesser degree.”¹²³⁸ Moreover, Additional Protocol II lacks an international mechanism to ensure respect, by both sides, for their obligations.¹²³⁹ Nevertheless, the right of the ICRC ‘to offer its services to the parties to an internal armed conflict’, as codified by the Convention’s Common Article 3, was reaffirmed albeit limited to a single Article without mentioning the ICRC by the Diplomatic Conference as a manifestation of an expression of unanimous political will.¹²⁴⁰ According to Moir, ‘the reluctance to accept such a role for outside organizations again underlines the fear of the developing nations that such provisions would encourage interference in their domestic affairs.’¹²⁴¹ The biggest difficulty with Additional Protocol II (in fact, this applies to both Protocols) is two-fold; firstly, it is a newly created convention and there has not been enough time for it to harden into customary law, as a result, it only creates treaty law for those states which have ratified or agreed to it, secondly, it has not been received with universal approval.¹²⁴² The main reason for the second part stemmed from the fact that there was a general reluctance on the part of major powers to commit themselves to this instrument since they were not affected by internal armed conflicts. As for the smaller nations beset by tribal and ethnic conflicts, they were very much wary of handing out a *carte blanche* to would be separatists in their territory, consequently compromising their territorial integrity.¹²⁴³

¹²³⁶ Additional Protocol I 1977, Article 44(3).

¹²³⁷ See generally H-P. Gasser, ‘A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct’ (1988) 262 *IRRC* 38, p. 38.

¹²³⁸ See Sylvie-Stoyanka Junod, ‘ICRC, Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)’, in Sandoz, et al., ‘Commentary Additional Protocols’, p. 1307.

¹²³⁹ H-P Gasser, ‘Negotiating the 1977 Additional Protocols: was it a waste of time’, in ‘Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven’, Kalshoven, Delissen et al. (ed.), pp. 81-92, p. 83

¹²⁴⁰ Article 18, Additional Protocol II; the Article only refers to ‘relief societies located in the territory of the High Contracting Party, such as Red Cross [Red Crescent] Organizations’.

¹²⁴¹ Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 95.

¹²⁴² *Prosecutor v. Tadic*, IT-94-1, Appeals Chamber Decision on Jurisdiction (2 Oct. 1995), para. 117; Green, ‘The Contemporary Laws of Armed Conflict’, *op. cit.*, p.320.

¹²⁴³ Abi-Saab, ‘Non-International Armed Conflict’, *op. cit.*, pp. 261-64.

3.8.2.3 The threshold for the application of Additional Protocol II

In regards to Additional Protocol II, the concept of internal armed conflict sets a much higher threshold of application compared to Common Article 3 that applies to all situations of non-international armed conflict.¹²⁴⁴ This approach is very much reflected in the definition of non-international conflicts in Article 1 of Additional Protocol II which define it as:

All armed conflicts which are not covered by Article 1 of Protocol I and which take place in the territory of a high contracting party between its armed forces and dissident armed forces or other organised armed groups which under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol. The protocol shall not apply to situations of internal disturbances and tensions, such as riots and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

It has been noted that by adopting such a high threshold, it is very unlikely that the Additional Protocol II would operate in a civil war until the rebels were well established and were controlling part of the territory through a *de facto* government as in the case of the nationalist revolution in Spain.¹²⁴⁵

3.8.2.4 The binding nature of Additional Protocol II

As in the case of Article 3 the same justification of the principle of legislative jurisdiction have been used regarding the binding nature of Protocol II.¹²⁴⁶ Protocol II, 'at least taken on face value, does not confer rights or impose obligations on rebels, in that it does not permit them formally to become party to it. It would therefore seem that states are the only international entities to which the Protocol applies.'¹²⁴⁷ Moir opines that for the Protocol 'to have any legal effect for insurgents, two criteria must accordingly be met: (a) the High Contracting Parties must have intended the Protocol to bind insurgents, and (b) the insurgents must, in turn, accept the rights and obligation thereby conferred upon them.'¹²⁴⁸

¹²⁴⁴ According to Drapper the main reason for this was to make to more detailed and demanding rules of Additional Protocol II acceptable to states; G.I.A.D. Draper, 'International Law and Internal Armed Conflicts (1983) 13 *Georgia Journal of International & Comparative Law*, 253, p. 275.

¹²⁴⁵ Green, 'The contemporary Law of Armed conflict', *op. cit.*, p. 83.

¹²⁴⁶ Moir, 'the Law of Internal Armed Conflict', *op. cit.*, p. 96; see also the Soviet statement, CDDH/III/SR.32; Official Records, XIV, p. 314.

¹²⁴⁷ Cassese, 'The Status of Rebels under the 1977 Geneva Protocol', *op. cit.*, p. 420.

¹²⁴⁸ Moir, 'the Law of Internal Armed Conflict', *op. cit.*, p. 97.

If a dissident NSAG were to be covered by the Additional Protocol II, it should be under responsible command; be able to maintain discipline and ensure compliance with the Protocol.¹²⁴⁹ The other vital prerequisite of the Additional Protocol II is the proviso of territorial control of a certain part of the national territory imposing a threshold reminiscent to that stipulated by the recognition of belligerency in traditional international law.¹²⁵⁰ Rene Provost opines that ‘Protocol II can be considered a regression, given that it requires basically the same conditions as did the recognition of belligerency, but without triggering the full application of all humanitarian rules for international armed conflict.’¹²⁵¹ Some scholars even go as far as claiming that Protocol II has in effect reiterated the general rule of international law relating to the status of belligerency.¹²⁵² The NSAGs in question should also be able to mount and sustained military operations. Green encapsulates this by applying it to a modern case: ‘The Palestinian Liberation Organisation, certainly before it secured control of any part of the formerly Israeli-administered territories, was outside the scope of the Protocol’s operation, even if Israel had become a party thereto. The same is also true of both Hamas and Hezbollah movements.’¹²⁵³

Apart from controlling part of the territory as a necessity, for a group to be covered by the Protocol, the conflict in which it is involved in should meet a certain threshold similar to the one which prevailed in the Spanish Civil war allotted to the nationalist forces, in that they acquired recognition as a *de facto* administration with legal immunities and responsibilities of the legitimate government.¹²⁵⁴ It is worth mentioning that Protocol II would not cover NSAGs which are constantly on the move; since many of these groups because of their fluid nature and irregular activities can not satisfy the preconditions stated in Protocol II.¹²⁵⁵ Likewise NSAGs engaged in guerrilla or partisan activities against the central government of a territory will not be covered by Additional protocol II but will be protected under the Common Article 3. There are many organisations around the world that call themselves ‘national liberation movements’ involved in urban guerrilla warfare, civil disturbance, riots

¹²⁴⁹ *Prosecutor v. Akayesu* (Case No. ICTR-96-4), Trial Chamber Judgment, 2 September 1998, paras. 625-6; an interpretation of the concept of ‘armed forces’ in Article 1(1) of Additional Protocol II.

¹²⁵⁰ Cullen, ‘The Concept of Non-International Armed Conflict in IHL’, *op. cit.*, p. 107.

¹²⁵¹ Provost, ‘International Human Rights’, *op. cit.*, p. 264.

¹²⁵² M.R. Rwelamira, ‘the Significance and Contribution of the Protocols Additional to the Geneva Conventions of August 1949’ in C. Swinarski (ed.), *Etudes et essays sur le droit international humanitaire et sur les principes de la Croix-Rouge, en honneur de Jean Pictet*, (the Netherlands: Martinus Nijhoff Publishers), 1984, pp. 234-5.

¹²⁵³ Green, ‘The Contemporary Law of Armed Conflict’, *op. cit.*, p.321.

¹²⁵⁴ See *Arantzazu Mendi* [1939] A.C. 256.

¹²⁵⁵ F. Patel-King & S. Swaak-Goldman, ‘The Applicability of international Humanitarian law to the ‘War against Terrorism’’, in *Hague Yearbook of International Law*, J.G. Lammers (ed.), Martinus Nijhoff Publishers, 2004, pp. 39-50, p. 46.

and resort to terrorism that would not be covered by the Protocol, even if the central government's forces are involved in the maintenance of law and order operations.¹²⁵⁶ Furthermore, as the Commentary observes, Additional Protocol II, does not apply to situations where there is no functioning government as in the case of "failed states".¹²⁵⁷ Moreover, the readiness of any NSAG to abide by Protocol II must be determined on the basis of each individual conflict, which could be made in the shape of a unilateral declaration to an impartial body such as ICRC to guarantee respect for the provisions of the Protocol II.¹²⁵⁸

3.8.2.5 State practice related to Additional Protocol II

As noted above, many states are reluctant to recognise any insurgency even according to lower threshold of Common Article 3, i.e. that there is an 'armed conflict not of international character occurring within the territory of one of the high contracting parties'.¹²⁵⁹ In the light of the denial of insurgency the question that arises is whether such a denial really matters? Greenwood has emphasised the acceptance by a government of existence of an armed conflict is not a legal prerequisite; the obligations in Common Article 3 and Protocol II will be applicable provided that certain objective criteria are met.¹²⁶⁰ As stated above, in regards to international law, wars of national liberation are the only context in which NSAGs' legal *combatancy* is recognized in search of exercising their right to self-determination and whose struggle was elevated to the level of international armed conflict.¹²⁶¹ This came about as the

¹²⁵⁶ Additional Protocol II, Article 1(2).

¹²⁵⁷ It says: 'the Protocol applies on the one hand in a situation where the armed forces of the government confront dissident armed forces, i.e., where there is a rebellion by part of the government army or where government's armed forces fight against insurgents who are organized in armed groups, which is more often the case. This criterion illustrates the collective character of the confrontation; it can hardly consist of isolated individuals without co-ordination.'

¹²⁵⁸ Moir notes that, 'that no mechanism provides for unilateral declarations (in contrast to Article 96(3) of Protocol I, under which the authority representing a national liberation movement can undertake to apply the Protocol by addressing a unilateral declaration to the depositary) can be explained by the fact Protocol II only comes into effect where the rebels can and actually do apply its provisions anyway.', Moir, 'the Law of Internal Armed Conflict', *op. cit.*, p. 99.

¹²⁵⁹ Cassese, 'The Status of Rebels under the 1977 Geneva Protocol', *op. cit.*, p. 421.

¹²⁶⁰ Clapham, 'Non-State Actors in Times of Armed Conflict', *op. cit.*, p. 287.

¹²⁶¹ The manifestation of an international armed conflict is a conflict taking place between two or more armed forces of states. If such acts were to take place by one state against another they would be construed as an act of war. It is a well-known fact that international armed conflicts are regulated by the four Geneva Conventions of 1949 and Additional Protocol I of 1977, if binding on the parties involved. Art. 2 Common to Geneva Conventions of 1949 sets out conditions in which it applies: 'to all cases of declared war or of any other armed conflict which may arise between two or more of High Contracting Parties, even if the state of war is not recognized by one of them. The convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance'.

opinion developed in the 1960s that wars of national liberation were international conflict within the ambit of Article 2 of the Geneva Conventions of 1949.¹²⁶² Right after the Geneva Conferences concluded the formulation of Additional Protocols a member of the US Delegation wrote: ‘the two new Protocols will now have to be submitted to the Senate for its advice and consent prior to ratification. This procedure will probably move quickly, and before long the two new Protocols will be in force for the United States.’¹²⁶³ Even after thirty-five years the United States has not ratified the two Protocols. In 1997, Ambassador Aldrich, head of the US delegation, stated:

Looking back ... I deeply regret ... I did not press, within the executive branch of my government, for prompt submission of Protocols to the Senate I failed to realize that, with the passage of time, those in both [the US State and Defence] Departments who had negotiated and supported the Protocols would be replaced by sceptics and individuals with different political agendas.¹²⁶⁴

Indeed, the attitude of the United States Government is very much reflected by those states which are reluctant to ratify both Protocols mainly because of being beset by internal dissent as in the case of the three states under consideration, namely, Turkey, Iraq and Iran.

3.9 NSAGs: armed conflict reclassified?

Given the primacy of internal armed conflicts in the contemporary international relations and the fact that some of the most heinous crimes are generally committed against civilians, it is rather surprising that the attention of scholars and the international community lie elsewhere.¹²⁶⁵ As discussed above, the IHL has traditionally divided armed conflicts into bifurcated legal distinction between inter-state and intra-state conflicts. According to Sassoli:

For a situation to classified as an international armed conflict between states, the necessary level of violence is lower and the number of treaty rules applicable in such a conflict is much longer than for non-international armed conflicts. For violence with a

¹²⁶² D. Schindler, ‘Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’, *Recueil Des Cours*, Vol. 163(2), 1979, 121-159, p. 133.

¹²⁶³ Baxter, ‘Modernizing the Laws of War’, *op. cit.*, p. 184.

¹²⁶⁴ G.H. Aldrich, ‘Comments on the Geneva Protocols’ 320 IRRC 31 October 1997. Hays Parks states that throughout Protocol negotiations, the American delegation did not well represent the United States. Moreover, he opines, ‘[t]he delegation members prepared their position papers with little or no consultation with the military service staffs, the office of the Secretary of Defence, or the GCS, and then submitted their position papers to the GCS for approval ... [There was a] lack of military cognizance over the actions of the United States delegation.’ W. Hayes Parks, ‘Air War and the Law of War’, 32-1 Air Force L. Rev. (1990), 1, p. 143.

¹²⁶⁵ See A. Carrillo-Suarez, ‘*Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*’, 15 *American University International Law Review* 4 (2002).

non-state actor to amount to an armed conflict (not of an international character), its intensity must be much greater.¹²⁶⁶

3.9.1 The bifurcated legal distinction

At the outset, it has to be determined whether the armed conflict is of international or internal (non-international) nature in order to engage the respective applicable humanitarian treaty law framework.¹²⁶⁷ This traditional dichotomy has been reiterated by the International Court of Justice decision in the Advisory Opinion on the *Legal Consequence of the Construction of the Wall in the Occupied Palestinian Territory*.¹²⁶⁸ In that case Israel's justification of building a security fence was rejected since Israel 'does not claim that the attacks against it are imputable to a foreign state'.¹²⁶⁹

In 2008, the ICRC released a paper entitled: "How is the Term "Armed Conflict" Defined in International Humanitarian Law?" in which it adheres to the classical dichotomy of international and non-international armed conflict and proposes to define them as follows:

- (1) International armed conflicts exist whenever there is resort to armed forces between two or more states.
- (2) Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a state [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and parties involved in the conflict must show a minimum of organisation.¹²⁷⁰

As discussed previously, the IHL does not provide a settled legal definition for 'armed conflict'. This unguided case-by-case analysis has often produced unsatisfactory results and has always been shrouded in controversy.¹²⁷¹ In order for the instruments of international

¹²⁶⁶ M. Sassoli, 'the Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in O. Ben-Naftali (ed.) 'International Humanitarian Law and International Human Rights Law', Oxford U.P., 2011, pp. 34-95, p. 51.

¹²⁶⁷ Pejic, "Status of Armed Conflict", *op. cit.*, p. 77.

¹²⁶⁸ The Advisory Opinion on the *Legal Consequences of the Construction of the Wall In the Occupied Palestinian territory*, I.C.J. (2004) Available at <http://www.icj.org/icjwww/idocket/imwp/imwp-frame.htm>.

¹²⁶⁹ The Wall Opinion, *op. cit.*, at 56, para. 139.

¹²⁷⁰ International Committee of Red Cross (ICRC), Opinion Paper, March 2008, 'How is the Term "armed conflict" Defined in International Humanitarian Law', <<http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>>.

¹²⁷¹ Generally see, Bond, 'the Rules of Riot and the Law of War', *op. cit.*; M. Veuthey, 'A Survey of International Humanitarian Law in Non-International Armed Conflicts: 1949-1974' in M. Cherif Bassiouni, (ed.), *International Terrorism and Political Crimes* (Springfield, Charles C. Thomas, 1975), p. 86; A. Cassese, 'Human Rights in Internal Strife: Their International Protection', Cambridge U.P., 1987; GIAD Draper, 'The

humanitarian law (IHL) to apply, there must be an armed conflict or occupation.¹²⁷² This is regardless of whether the initial decision was taken in conformity with the rules and principles of *jus ad bellum* or not.¹²⁷³ Normally, states are reluctant to admit the existence of an armed conflict as well as the level of intensity between the government forces and a NSAG that automatically trigger IHL obligations.¹²⁷⁴ Reluctance of states not to recognize a NSAG operating on their territory is not to provide them legal status and legitimacy.¹²⁷⁵ The twentieth century and the first decade of the twenty-first century have witnessed a proliferation of NSAGs' involvement in armed conflicts mostly within borders of a sovereign state involving the central government's armed forces and a NSAG or between multiplicity of such groups in some cases in the so-called 'failed states' engaged in violence.¹²⁷⁶ Consequently, the characteristic of contemporary armed conflict presents fresh challenges to protection of civilians in particular and application of IHL in general.¹²⁷⁷

3.9.2 Internal disturbance and tensions

Treaty law provides some indication of situations that do not amount to an armed conflict, Article 2(1) of Additional Protocol II, deals with 'non-international armed conflict', and specifically mentions the violent situations that the Protocol excludes from its scope as 'not being armed conflicts', including 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups; other acts of a similar nature, including, in particular, large scale arrests of

Geneva Convention of 1949', (1965), *op. cit.*, p. 114 *Recueil Des Cours* 59; D.P. Forsyth, 'Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflict', (1978) 72 *AJIL* 272; D. Schindler, 'International Humanitarian Law and Internationalized Internal Armed Conflicts' (1982) 22 *IRRC* 255; H. Salinas Burgos, 'The Application of International Humanitarian Law as Compared to Human Rights Law in Situations Qualified as Disturbances and Tensions, Or Public Emergency, with Special Reference to War Crimes and Political Crimes', in F. Kalshoven and Y. Sandoz (eds.), 'Implementation of International Humanitarian law' (Boston, Martinus Nijhoff, 1989); D. Momtaz, 'The Minimum Humanitarian Rules Applicable in periods of Tension and Internal Strife' (1998) 324 *IRRC* 455; H. Fujita, 'Application of International Humanitarian Law to internal Armed Conflicts', in T.L.H. McCormack, M. Tilbury & G.D. Triggs (eds.), 'A Century of War and Peace: Asia-Pacific Perspectives on the Centenary of the 1899 Hague Peace Conference (The Hague, Kluwer International, 2001); L. Moir, 'The Law of Internal Armed Conflict', *op. cit.*

¹²⁷² A.P.V. Rogers, 'Unequal Combat and the Law of War', *Yearbook of IHL* Vol. 7, 2004, pp. 3-34, p. 7.

¹²⁷³ Coates, A., "Is the Independent Application of *jus in bello* the Way to Limit War?" in "Just and Unjust Warriors: the Moral and Legal Status of Soldiers", Rodin, D. Shue, H., (ed.), Oxford U.P., 2008, p. 176

¹²⁷⁴ F. Bugnion, 'Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts', (2003) 6 *YIHL* 168.

¹²⁷⁵ Sandoz, 'International Humanitarian Law in the 21st Century' (2003) 6 *YIHL* 14.

¹²⁷⁶ See M. Kaldor, 'New and Old Wars: Organized Violence in a Global Era', Stanford U.P., 1999.

¹²⁷⁷ Armed conflicts seem to have evolved into more complex and more permanent peace settlements more difficult to achieve; see e.g. 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', Report Prepared by the International Committee of Red Cross, 28th International Conference of the Red Cross and Red Crescent, Geneva, 2-6 December 2003, p. 7.

people for their activities or opinions”, as not being armed conflict’.¹²⁷⁸ The ICRC provided the following explanation of civil disturbances in the Diplomatic Conference of Government Experts in 1971 prior to the adoption of the two Protocols:

This involves situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. The latter can assume various forms, all the way from spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed force, to restore internal order. The high number of victims has made it necessary the application of a minimum of humanitarian rules.¹²⁷⁹

As regards to situations of “internal tension”, those could be said to include in particular of situations of a serious tension (political, religious, racial, social, economic, etc.), but also internal disturbances. Such situations have one or more of the following characteristics, if not all at the same time:

- large scale arrests;
- a large number of “political” prisoners;
- the probable existence of ill-treatment or inhumane conditions of detention;
- the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact;
- allegations of disappearances.

In short, there are internal disturbances, without being an armed conflict, when a state uses armed forces to maintain order; there are internal tensions, without being internal disturbances, when force is used as a preventive measure to maintain law and order. While designed for practical use, they may serve to shed some light on these terms, which appear in an international instrument for the first time.¹²⁸⁰

Moreover, ICTY has stated that the ICRC Commentary provides criteria which are useful indicators of what constitutes an armed conflict according to Common Article 3:

¹²⁷⁸ See ICTY distinguishing armed conflict from lesser forms of violence such as “*banditry, unorganized and short-lived insurrections, or terrorist activities*”, *Prosecutor v. Boskoski & Tarculovski*, Case No. IT-04-82-T, Judgement (Trial Chamber) 10 July 2008 at paras. 175, 176.

¹²⁷⁹ Conference of Governmental Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1971), quoted in Sandoz, Swinarski & Zimmermann, *Commentary on the Additional Protocols of 1977 to the Geneva Conventions*, *op. cit.*, p. 1355.

¹²⁸⁰ *Commentary on the Additional protocols*, *op. cit.*, at 1355.

- (1) The party in revolt against the *de jure* government possess an organized military force, an authority responsible for its acts, acting within determinate territory and having the means of respecting and ensuring respect for the Convention.
- (2) That the legal government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of the part of the national territory.
- (3) (a) That the *de jure* government has recognized the insurgents as belligerents; or
 - (b) that it has claimed for itself the rights of belligerents; or
 - (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
 - (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace and security, a breach of the peace, or an act of aggression.
- (4) (a) That the insurgents have an organization purporting to have the characteristics of a state.
 - (b) That the insurgent's civil authority exercise *de facto* authority over the population within a determinate portion of the national territory.
 - (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
 - (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.¹²⁸¹

International law does not consider the use of force by criminal gangs, street rioting even activities instigated by well organised terrorist groups as amounting to armed conflict.¹²⁸² It is worth noting that the Inter-American Commission in *Abella* case recognized that fairly low-level internal violence triggers IHL since it 'does not require the existence of large scale and generalized hostilities or a situation comparable to a civil war in which dissident armed exercise control over parts of national territory.'¹²⁸³ In *Abella* case, the commission applied IHL to an organized attack by 42 armed civilians on La Tablada military installations in Argentina in which 1500 military personnel were deployed to repel the attack.¹²⁸⁴ The attack

¹²⁸¹ J. Pictet (ed.) III Commentary on the Geneva Conventions of 12 August 1949, at 36.

¹²⁸² A.V.P. Rogers, "Unequal Combat and the Laws of War" *YIHL* Vol. 7, 2004, pp. 3-34, p.7; see also Moir, L., "The Law of Internal Armed Conflict", 1st ed., Cambridge U.P., 2002, pp. 67-88.

¹²⁸³ Juan Carlos Abella v Argentina Case 11.137, Report No 55/97, IACHR, OEA/Ser.L/V/II.95 Doc 7 rev at 271.

¹²⁸⁴ For a commentary on the case see L. Zegveld, 'the Inter-American Commission on Human Rights and international Humanitarian Law: A Comment on the *Tablada* Case', 324 *IRRC* 505-511 (1998).

lasted 30 hours and resulted in the death of 29 attackers and a number of military personnel. However, this is a rather unique and isolated case and in the opinion of the present author sets a dangerous precedent by recognizing such civil disturbances as armed conflicts. It is significant to point out that no other international court or tribunal has followed this approach by applying IHL to what could only be described as a low intensity internal violence.

3.9.3 NSAGs and defining armed conflict

In relation to a state, there is always reluctance on the part of the government to admit that there is an armed conflict taking place on its territory, as in the case of Russia that ignored to recognize existence of an armed conflict in spite of the pronouncement by the Russian Supreme Court in 1995 that Additional Protocol II was applicable to the conflict in Chechnya.¹²⁸⁵ However, upon the resumption of the conflict in 1999 the Russian government opted to classify the conflict as an anti-terrorist operation, hence, denying the fact that an internal armed conflict was taking place on its territory.¹²⁸⁶ By the same token, since the start of the armed campaign by the PKK in 1984, Turkey has never accepted that there is an armed conflict taking place on its territory.¹²⁸⁷

It is submitted that the modern conflicts that NSAGs are engaged in do not fall within the existing framework of the IHL.¹²⁸⁸ In fact, attempting to compartmentalize contemporary armed conflicts in the above manner has been open to criticism for some time.¹²⁸⁹ Although many of NSAGs predominantly operate within borders of a certain territory but ultimately they extend their sphere of influence and military operations beyond those boundaries. The Middle East and in particular the three Kurdish entities under consideration in Turkey, Iraq and Iran could be cited as a good example of this phenomenon where the international instruments are incapable of dealing with NSAGs since their activities are no longer limited to the borders of the states they operate in.¹²⁹⁰

¹²⁸⁵ P. Gaeta, 'The Armed Conflict in Chechnya before the Russian Constitutional Court', *EJIL* (1996) 563-570; see also *Isayeva v Russia* (2005) 41 *EHRR* 38.

¹²⁸⁶ J. Pejic, "Status of Armed Conflict" in "Perspectives on the ICRC Study on Customary International Humanitarian Law", Wilmshurst, E. and Breau, S. (ed.), Cambridge U.P., 1st ed., 2007, p. 79.

¹²⁸⁷ *Ibid*, p. 86.

¹²⁸⁸ See C. Gray, "Bosnia Herzegovina: Civil War or Inter-State Conflict? Characterization and Consequences", 67 *Brit. YBIL* 1996, 155.

¹²⁸⁹ K. Watkin, '21st Century Conflict and International Humanitarian Law', in "International Humanitarian Law and Armed Conflict: Exploring the Fault-lines", Schmitt M., and Pejic, J., (ed.), Martinus Nijhoff Publishers, 1st ed., 2007, pp. 265-296, p. 268.

¹²⁹⁰ As noted above, the operations of Kurdish NSAGs have never been limited to the borders of the three states under consideration.

The ICTY in the case of *Tadic* has also provided a definition of both international and non-international armed conflict that:

Exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within state ... These hostilities [fighting among groups within the Former Yugoslavia] exceed *the intensity requirements* applicable to *both international and internal armed conflicts*. There has been protracted, large scale violence between the armed forces of different states and between governmental forces and organized insurgent groups.¹²⁹¹

Moir opines that the *Tadic* definition is much closer to the definition provided in Common Article 3 rather than the higher intensity level of Additional Protocol II, nor does the above definition require any control of territory, compliance with humanitarian law by the NSAGs involved and significantly there is no requirement of the government troops actually taking part in the hostilities.¹²⁹² The subsequent judgements of the ICTY and ICTR have approved the latter approach, although some writers have noticed exercise of caution on the part of ICTR. The Appeal Chamber's provided definition in *Tadic* is still 'termed in the abstract and whether or not a situation can be described as an "armed conflict", meeting the criteria of Common Article 3, is to be decided on a case-by-case basis.'¹²⁹³ It is worth noting that the Statute of ICTR also contains norms of international humanitarian law expressly relating to armed conflicts of non-international character.¹²⁹⁴ The *Tadic* Trial Chamber concentrated on two crucial aspects of a conflict which may involve NSAGs: the intensity of the conflict and the organization of the parties to the conflict. The Chamber stated: '[I]n an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law'.¹²⁹⁵

More recently, Article 8 of the Rome Statute of the International Criminal Court (ICC),¹²⁹⁶ provides a definition of internal armed conflict. Hence, according to Article 8(2)(f) of the

¹²⁹¹ *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para 70 (Oct. 2, 1995).

¹²⁹² Moir, 'Non-International Armed Conflict and Guerrilla Warfare', *op. cit.*, p. 328.

¹²⁹³ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgement, para 91 (Dec. 6, 1999).

¹²⁹⁴ Robinson & Von Hebel, 'War Crimes in International Conflicts: Article 8 of the ICC Statute', *op. cit.*, p. 199.

¹²⁹⁵ *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber), 7 May 1997, para. 562.

¹²⁹⁶ Statute of International Criminal Court, UN doc. A/Conf. 183/9, 17 July 1998, (1998) 37 *ILM* 1002.

ICC Statute, ‘the Court will have jurisdiction over serious violations of the laws and customs of war committed in armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authority and organised armed groups or between such armed groups.’¹²⁹⁷ It has been argued that the aforementioned definition was very much influenced by the case-law of ICTY and is more in tune with the definition provided in Common Article 3 than that of Additional Protocol II.¹²⁹⁸ It is the only provision which unequivocally refers to armed conflict and clearly distinguishes between international and non-international armed conflict as well as internal disturbances and tensions. On the importance of inclusion of a definition of internal armed conflict Moir notes:

The existence or otherwise of a non-international armed conflict is not, however, only relevant to the applicability of Common Article 3, Additional Protocol II or customary law. It is also a vital question for the purposes of international criminal law, in that war crimes can only be committed in the context of, and associated with, armed conflict.¹²⁹⁹

In regards to non-international armed conflict the list of war crimes in the form of ‘serious violation of Article 3 common to the Geneva Conventions’¹³⁰⁰ could be found in Article 8(2)(c), which ‘applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature’. Other serious violations of the laws costumes of non-international armed conflict are listed in Article 8(2)(e). What constitute the concept of internal armed conflict is elucidated in subparagraph (c) and (e), thus clarifying the scope of application.¹³⁰¹ This definition maintains the concept of national sovereignty of states and repeats and reinforces the classical applicability of IHL between international and non-international armed conflict.¹³⁰² It is also worth noting that Article 8(3) of the Rome Statute based upon Article 3(1) of Additional Protocol II, reiterates the responsibility of a state to maintain and re-establish law and order as well as protecting its territorial integrity,

¹²⁹⁷ This definition was proposed by the delegation of Sierra Leone, see UN. Doc.A./CONF.183/C.1/L.62 (13 July 1998).

¹²⁹⁸ According to La Haya delegations to the Rome Conference for the creation of a permanent International Criminal Court deliberately and substantially deviated from the definition appearing in Additional Protocol II; La Haye, ‘War Crimes in Internal Armed Conflict’, *op. cit.*, p. 9; see also the first ‘Bureau discussion paper’: UN.Doc.A./CONF.183/C.1/L.53, 6 July 1998).

¹²⁹⁹ Moir, ‘Non-International Armed Conflict and Guerrilla Warfare’, *op. cit.*, p. 330.

¹³⁰⁰ Article 8(2)(c) of the ICC Statute.

¹³⁰¹ Robinson & Von Hebel, ‘War Crimes in International Conflicts: Article 8 of the ICC Statute’, *op. cit.*, p. 199.

¹³⁰² H. Spieker, ‘The International Criminal Court and Non-International Armed Conflict’, 13 *LJIL*, 395-425 (2000), pp. 405-406.

by all *legitimate* means.¹³⁰³ It is significant to note that the Rome Statute does not limit itself to conflicts between governments and armed groups, it also excludes the pre-requisite attached to Additional Protocol II that dissident armed forces or other organized groups should be ‘under responsible command or exercise such control over part of the territory as to enable them to carry out sustained and concerted military operations’.¹³⁰⁴

3.10 The importance of customary law

In recent years the importance of customary international law in relation to armed conflict has achieved special importance mainly ‘due to the perceived need that certain obligations are customary so that they can form the basis for the prosecution of an individual for an international crime before an international criminal tribunal.’¹³⁰⁵ Unlike International treaties or domestic law, custom does not result from a standardized process of rule-making, and as evidence of a general practice, international custom is defined in Article 38 of the Statute of the International Court of Justice (ICJ). Customary international law is formed of widespread and consistent state practice and *opinio juris* as well as a belief that a certain practice is binding upon states as a matter of law.¹³⁰⁶ This general practice has ‘to be both extensive and virtually uniform’,¹³⁰⁷ as well as a psychological or subjective belief by states that such a behaviour is required by law.¹³⁰⁸ Customary international law has also been considered and taken into account by domestic courts.¹³⁰⁹ The task of determining different elements of international law relating to NSAGs and internal armed conflict is not an easy one and

¹³⁰³ Moir describes this as: “merely a sop to worried governments, assuring them that the inclusion of internal armed conflicts within the jurisdiction of the Court will not allow unjustified interference in the domestic affairs of the state.”; Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 167.

¹³⁰⁴ D. Willmott, ‘Removing the Distinction between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court (2004) 5 *Melb. JIL* 196, p. 218; H. Spieker, ‘The International Criminal Court and Non-International Armed Conflicts (2000) 13(2) *LJIL* 395, p. 409.

¹³⁰⁵ A. Clapham, ‘The Rights and Responsibilities of Non-State Actors: The Legal Landscape & Issues Surrounding Engagement, 1 February 2010, p. 10, available at: ssm.com/abstract=1569636.

¹³⁰⁶ ICJ case-law has held that customary IHL is binding upon states even if they have not ratified it, as long as the state in question has not been a “persistent objector” to the customary international law norm in question, *Asylum Case (Columbia v. Peru)*, ICJ Reports, 1950, para. 277; *Fisheries case (United Kingdom v. Norway)*, ICJ Report 1951, para. 131.

¹³⁰⁷ *North Sea Continental Shelf Case (Fed. Rep. Germany v. Denmark; Fed. Rep. Germany v. Netherlands)*, 1969, ICJ Reports 43.

¹³⁰⁸ Shaw, ‘International Law’, *op. cit.*, p.75.

¹³⁰⁹ See the case of Pinochet before the House of Lords (The Supreme Court of the United Kingdom now) in the UK, in which their Lordships made extensive use of customary international law in their judgment; Opinion of Lord Millet, in *Regina v. Bow Street Stipendiary Magistrate and Others ex parte Pinochet*, House of Lords, judgment of 24 March 1999 [1999] 2 *All ER* 102.

ultimately may be insufficient.¹³¹⁰ Furthermore, identification of customary international norms is of paramount importance for reaching NSAGs, who are not party to IHL instruments or the United Nations.¹³¹¹ Consequently, it is important to make reference to customary law as well as general principle of international law applicable to armed conflict situation such as the Martens clause, a tangible legal tool which has acquired customary character in international law.¹³¹² The Preamble to the 1899 Hague Convention II perfectly encapsulates the concept of Martens clause which states: ‘Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirement of the public conscience.’¹³¹³ According to Detter, ‘the Martens clause is of the greatest importance in modern international law, especially to rebut any suggestions that states are free to behave as they wish within their own territory ...’¹³¹⁴

The Martens clause constitutes the most important of humanitarian principles in the corpus of the IHL which has significantly been reaffirmed in all subsequent major codifications such as all four 1949 Geneva Conventions which relying upon Martens clause in the case of a party’s denunciation of the said Conventions.¹³¹⁵ It says, ‘parties to the conflict [including the denouncing power] shall remain bound to fulfil [their obligations] by the virtue of principles of the law of nations, as they result from the laws of humanity and the dictates of the public conscience.’¹³¹⁶ It has also been noticed elsewhere by Meron that the Martens clause provides an essential tool for protection of persons affected by an armed conflict because, ‘the adoption of a treaty regulating particular aspects of the laws of war does not deprive the affected persons of the protection of these norms of customary international law that were not included in the codification.’¹³¹⁷

¹³¹⁰ S. Sivakumaran, ‘Binding Armed Opposition Groups’, *ICLQ* vol. 55, April 2006, pp. 369-394, p. 371.

¹³¹¹ See Meron ‘The Continuing Role of Custom in Formation of International Humanitarian Law’, (1996) 90 *AJIL* 246.

¹³¹² See V.V. Pustogarov, ‘The Martens Clause in International Law’, 1 *J. Hist. Int’l L.* 125 1999; H. Strebel, ‘Martens Clause’, *III Encyclopaedia of Public International Law*, pp. 326-327; see also E. Myles, “‘Humanity’, ‘Civilization’ and the ‘international Community’ in the Late Imperial Russian Mirror: Three Ideas topical for Our Days”, 4 *Journal of History International Law* 310 (2002).

¹³¹³ Schindler & Toman, ‘The Laws of Armed Conflicts’, *op. cit.*, p. 77.

¹³¹⁴ Detter, ‘The Law of War’, *op. cit.*, p. 188.

¹³¹⁵ R.G. Allen, et al., ‘Refining War: Civil War and Humanitarian Controls’, 18 *HRQ* 747 1996, p. 751.

¹³¹⁶ See Article 62 of 1949 Geneva Convention I, in Roberts & Guelff, ‘Documents on the Laws of War’, *op. cit.*, p. 218; see also J.L. Kunz, ‘The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision’, 45 *AJIL* 1951.

¹³¹⁷ T. Meron, ‘The Humanization of International Law’, Brill, 2006, p. 27.

As mentioned above, the treaty instruments regarding NSAGs and internal armed conflict are mainly contained in Common Article 3 and Additional Protocol II.¹³¹⁸ Additionally, the international community has developed a tendency to encompass both international and non-international armed conflicts in relation to the regulation of certain types of weapons such as the Chemical Weapons Convention in 1993.¹³¹⁹ Article 1 of the 1997 Ottawa Convention¹³²⁰ related to anti-personnel mines prohibits the use of anti-personnel mines in both international and non-international conflict.¹³²¹ Article 19 of the ‘Convention for the Protection of Cultural Property in the Event of Armed Conflict’ could also be cited as the proof of this trend, according to which the parties to an internal armed conflict must apply at least those provisions relating to respect for cultural property.¹³²² Article 22 of the Protocol II to the Convention, adopted in 1999, also applies explicitly to both international and non-international armed conflict.¹³²³ Therefore, it is an undeniable reality that the international community has developed a tendency to include both international and non-international armed conflicts in recent instruments relating to methods and means of warfare is reflective of developments in customary international law.¹³²⁴

The ICJ in the *Nicaragua* case identified that a considerable number of customary law principles are always applicable regardless of the label of the armed conflict.¹³²⁵ In other words, it could be argued that a more comprehensive body of rules which reflects customary international law applies to armed conflict regardless of their nature.¹³²⁶ This is in the light of

¹³¹⁸ For an analysis of this subject, see A. Cassese, ‘The Geneva Protocols of 1977 and Customary International Law’, 3 *UCLA Pacific Basin Law Journal* (1984), 55; R.R. Baxter, ‘Treaties and Custom’, *Recueil des cours*, 129 (1970, Vol. 1); on definition of customary law see also H. Thirlway, ‘The Sources of International Law’, in ‘International Law’, M. Evans (ed.), 2nd ed., 2006.

¹³¹⁹ Moir notes that although ‘... there is no explicit mention of non-international armed conflict, but the language used is absolute and makes it clear that chemical weapons are not to be used in any armed conflict, irrespective of its international or non-international character’, L. Moir, ‘Non-International Armed Conflict and Guerrilla Warfare’, in ‘International Criminal Law’, Vol. I: Sources, Subjects and Contents”, M. Cherif Bassiouni (ed.), Martinus Nijhoff Publishers, 2008, pp. 323-354, p. 326.

¹³²⁰ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 36 *ILM* 1507.

¹³²¹ 1997 Ottawa Convention was a major expansion of the rules adopted in 1996 by means of Amended Protocol II to the 1980 Conventional Weapons Convention; see Protocol on Prohibition or Restrictions on the Use of Mines, Booby-Traps and Other Devices (as amended 3 May 1996) to the Convention on Prohibition or restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have indiscriminate Effects, May 6, 1996, 35 *ILM* 1206.

¹³²² Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

¹³²³ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural property in the Event of Armed Conflict, Mar. 26, 1999, 38 *ILM* 769.

¹³²⁴ L. Moir, ‘Non-International Armed Conflict and Guerrilla Warfare’, in ‘International Criminal Law’, *op. cit.*, p. 326.

¹³²⁵ *Nicaragua* Case, (merit), p. 114.

¹³²⁶ Moir, ‘Towards the Unification of International Humanitarian Law’, *op. cit.*, p. 108.

the fact that IHL's continuous development through the process of state practice and political interaction is unstoppable.¹³²⁷

In relation to customary international rules applying to non-international armed conflict, the decision in 1995 by the Appeals Chamber of the ICTY in *Prosecutor v. Tadic*,¹³²⁸ is of considerable importance.¹³²⁹ This has been described as the first authoritative statement that not only customary international rules also apply to non-international armed conflict, but more importantly they largely stemmed from the rules applicable to international armed conflict.¹³³⁰ The Appeals Chamber held that those rules protecting civilians in international armed conflicts equally applied to non-international armed conflict, in step with many of the rules relating to methods and means of warfare.¹³³¹ In spite of this, the Chamber denied that non-international armed conflicts were regulated by the customary rules of humanitarian law in their entirety.¹³³² This prompted some scholars such as Greenwood and Warbrick to disagree with the approach adopted by the Chamber's position which has subsequently been vindicated by the development of IHL accordingly.¹³³³

The International Committee of Red Cross (ICRC) following more than eight years of research published a study of Customary International Humanitarian Law applicable during armed conflict.¹³³⁴ According to the ICRC, 'the purpose of this study is to enhance respect for international humanitarian law and thus to offer greater protection to victims of war'.¹³³⁵ The most relevant and striking aspect of this study relates to the attempt to bridge the gap between non-international armed conflict, for which treaty law is not as developed as in the case of highly densely regulated treaty regimes regarding international armed conflict.¹³³⁶ The rules on the conduct of hostilities, namely, 'the principle of distinction, the definition of military objectives, the prohibition of indiscriminate attacks, the principle of proportionality and the

¹³²⁷ T. Meron, 'War Crimes in Yugoslavia and the Development of International Law', 88 *AJIL*. (1994) 78, p. 80.

¹³²⁸ Case No. IT-94-1-AR72 (2 October 1995).

¹³²⁹ Moir, 'The Law of Internal Armed Conflict', *op. cit.*, p. 153.

¹³³⁰ Moir, 'Non-International Armed Conflict and Guerrilla Warfare', *op. cit.*, p. 327.

¹³³¹ *Tadic*, Appeal on Jurisdiction, at para 97.

¹³³² *Ibid*, at para 126; see also Moir, 'Non-International Armed Conflict and Guerrilla Warfare', *op. cit.*, p. 327.

¹³³³ Greenwood, C., 'International Humanitarian Law and the *Tadic* Case', 7 *EJIL* 265, 278 (1996); C. Warbrick & P. Rowe, 'The International Criminal Tribunal for Yugoslavia: the Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the *Tadic* Case', 45 *ICLQ* 691 (1996).

¹³³⁴ Henckaerts, *et al.*, 'Customary International Humanitarian Law: Rules', *op. Cit.*, p. 69.

¹³³⁵ 'Customary International Humanitarian Law: Report Prepared by the International Committee of Red Cross', 2003.

¹³³⁶ R. Wolfrum & V. Röben, 'Developments of International Law in Treaty Making', Springer, 2005, p. 58; It is significant to note that of 161 rules of customary international humanitarian law identified by the report, 147 are said to apply to both international and non-international armed conflict; Henckaerts, *et al.*, 'Customary International Humanitarian Law: Rules', *op. Cit.*, p. 197.

duty to take precaution in attack are all part of customary international law' and as a result bind on all parties to the conflict including NSAGs.¹³³⁷ In this regard, the President of ICRC Jakob Kellenberger encapsulates the importance of this development by stating:

... Yet civil wars often result in the worst suffering. The study clearly shows that customary international humanitarian law applicable in non-international armed conflict goes beyond the rules of treaty law. For example, while treaty law covering internal armed conflict does not expressly prohibit attacks on civilian objects; customary international humanitarian law closes the gap. Importantly, all conflict parties – not just States but also rebel groups, for example – are bound by customary international humanitarian law applicable to internal armed conflict.¹³³⁸

The study supports the finding of ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY), for instance, which held that conduct of hostilities rules apply equally in non-international and international armed conflict.¹³³⁹ According to one of the authors of the study:

The regulation of the conduct of hostilities and the treatment of persons in internal armed conflicts is thus more detailed and complete than that which exists under treaty law. It remains to be explored to what extent, from a humanitarian and military perspective, this more detailed and complete regulation is sufficient or whether further development in the law are required.¹³⁴⁰

The UN Commission on Darfur stated:

... That a body of customary rules regulating internal armed conflicts has thus evolved in international community ... some states in their military manuals for their armed forces clearly have stated that the bulk of international humanitarian law also applied to internal armed conflicts. Other states have taken similar attitude with regard to many rules of international humanitarian law.¹³⁴¹

In this regard, the Commission is referring to the military manuals of the UK and Germany as well as a number of comments made in the recent decades by the USA regarding what it

¹³³⁷ Andreopoulos, 'The Impact of the War on Terror on Accountability of Armed Groups', *op cit*, p. 180.

¹³³⁸ Customary law study enhances legal protection of persons affected by armed conflict, statement by International Committee of Red Cross (ICRC), 17-03-2005 News release No. 05/17; for text: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/6akdpf?opendocument>

¹³³⁹ See *Prosecutor v. Tadic*, Decision on Defence Motion, *op. cit.*, paras. 100-102.

¹³⁴⁰ J-M Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', 45 *IRRC* (2005) No. 857, pp. 175.

¹³⁴¹ Report of the UN Commission of Inquiry on Darfur to the United Nations Secretary General, Pursuant to Security Council Resolution 1564 of 18 September; Geveva, 25 January 2005, para. 159. Available at <<http://www.ohchr.org/english/darfur.htm>>.

considers as general rules regulating conduct in internal armed conflicts.¹³⁴² The Commission in Darfur also states that by including internal violations of IHL in the International Criminal Court Statute ‘proves that the general legal view evolved in the overwhelming majority of the international community ... to the effect that (i) internal armed conflicts are governed by an extensive set of general rules of international humanitarian law; and (ii) serious violations of those rules may involve individual criminal liability.’¹³⁴³ Therefore there is no doubt that ‘over the past thirty years there has been a general extension of the rules of international armed conflict to situations of non-international armed conflict.’¹³⁴⁴

There is no doubt that customary principles play a major role in international armed conflict perfectly highlighted in the International Military Tribunal in Nuremburg in which it was held that by 1939, the Hague Conventions had achieved customary status and were ‘recognised by all civilized nations’ and were considered ‘declaratory of the laws and customs of war’, consequently, ‘binding on all parties and non-parties alike’.¹³⁴⁵ However, customary rules¹³⁴⁶ relating to application of these norms to internal armed conflict and NSAGs until recently have been rather vague.¹³⁴⁷ Furthermore, in regards to internal armed conflict non-participation of some of the major (regional and world) powers in major treaties concerning IHL makes the importance of customary rules even more imperative to consider.¹³⁴⁸ Further discussion on the validity of different theories is beyond the scope of this study. However, it has to be acknowledged that there is no settled legal reasoning on the issue it is now accepted as uncontroversial and commonplace that NSAGs are bound by customary law.¹³⁴⁹

¹³⁴² See Fleck (ed.), ‘The Handbook of Humanitarian Law in Armed Conflict’. It refers to the German soldiers as being required to comply with the rules of IHL in the conduct of military operations in all armed conflict ‘however such conflicts are characterized’; see also the UK Ministry of Defence ‘the Manual’, pp. 384-98 sets out what the UK Government considers the ‘principles of customary international law applicable to internal armed conflict.’

¹³⁴³ Darfur Commission Report, *op. cit.*, at para. 162.

¹³⁴⁴ E. Crawford, ‘The Treatment of Combatants and Insurgents under the Law of Armed Conflict’, Oxford U.P., 2010, p. 30.

¹³⁴⁵ ‘Trial of German Major War Criminals’ (1946) CMD 6964, MISC No. 12, 65, cited in T. Meron, ‘The Geneva Conventions as Customary Law’, 81 3 *AJIL* 59.

¹³⁴⁶ For a general discussion of customary international law, see statute of International Court of Justice, June 26, 1945, Article 38, 59 stat. 1031, 1060, which defines what international law should be applied by the International Court of Justice; for a general discussion see also M.E. Villiger, ‘Customary International Law and Treaties’, Brill, 1985; C. Bruderlein, ‘Custom in International Humanitarian Law’, *IRRC*, No. 283, November-December 1991, p. 579.

¹³⁴⁷ Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 133.

¹³⁴⁸ Bothe, ‘Customary International Humanitarian Law: Some Reflections on the ICRC Study’, *op. Cit.*, p. 148.

¹³⁴⁹ A. Clapham, ‘The Rights and Responsibilities of Non-State Actors: The Legal Landscape & Issues Surrounding Engagement, 1 February 2010, p. 6, available at: ssm.com/abstract=1569636.

3.11 Common Article 3 as a basis for compliance

In order to regulate internal armed conflict, much has been relied upon customary law with little analysis of state practice and *opinion juris*.¹³⁵⁰ This is particularly important since compliance with treaty law is sometimes scarce.¹³⁵¹ Allied to this, it is claimed that ‘calamitous events and atrocities have repeatedly driven the development of international humanitarian law.’¹³⁵² All doubts with regard to the issue of threshold must be overcome for the sake of better humanitarian protection in line with the very ethos of IHL namely protection of civilians.¹³⁵³ Consequently, Common Article 3 should then be applied as widely as possible.¹³⁵⁴ It is worth noting that in recent times Common Article 3 has almost systematically been preferred as a basis to bring criminal charges at ad hoc Tribunals.¹³⁵⁵

Undoubtedly, the minimum protection under Common Article 3 to all four Geneva Conventions of 1949 was the first globally accepted piece of legislation to regulate treatment of citizens by their governments according to community standards.¹³⁵⁶ When considering its legacy, in spite of its deficiencies Common Article 3 has been put into practice in many internal conflicts since its inception. For instance, during the French-Algerian conflict, the Algerian National Liberation Front and the French government by and large accepted the applicability of Common Article 3 to that situation; the French strongly implied that the Article was applied as of June 1956.¹³⁵⁷ Moreover, Common Article 3, the most firmly established source of international law on internal armed conflict has also been called a statement of “affectionate generalities” than of precise guidelines.¹³⁵⁸ Nevertheless, it should be pointed out that the application of Common Article 3 does not affect the legal status of parties to a conflict.¹³⁵⁹ Similarly, Protocol II does not affect ‘the sovereignty of the state or

¹³⁵⁰ In recent times by and large most of these atrocities have taken place in armed internal armed conflicts; see T. Meron, ‘Human Rights and Humanitarian Norms in Customary Law’, Clarendon Press: Oxford, 1989, p. 36-7; G. Mettraux, ‘International Crimes and the *ad hoc* tribunals’, Oxford U.P., 2005, p. 15.

¹³⁵¹ E. La Haye, ‘War Crimes in Internal Armed Conflicts’, *op. cit.*, p. 50.

¹³⁵² T. Meron, ‘The Humanization of Humanitarian Law’, 94 *AJIL* (2000), 239, p. 243.

¹³⁵³ A. Paulus & M. Vashakmadze, ‘Asymmetrical War and the Notion of Armed Conflict: a Tentative Conceptualization’, *IRRC*, Vol. 91 No. 873 March 2009, p. 119.

¹³⁵⁴ ICTY, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement (Trial Chamber), 25 June 1999, para. 49.

¹³⁵⁵ Guénaél Mettraux, *International Crimes and Ad Hoc Tribunals*, Oxford U.P., 2005, p. 140.

¹³⁵⁶ Forsythe, ‘Legal Management of Internal War’, *op. cit.*, p. 274.

¹³⁵⁷ E.V. Greenberg, ‘Law and the Conduct of the Algerian Revolution’, *op. cit.*, see also ‘the ICRC and the Algerian Conflict’, (International Committee of Red Cross Pamphlet, 1962).

¹³⁵⁸ T.J. Farer, ‘The Laws of War 25 Years after Nuremberg’, *INT. Conciliation*, No. 538, (1971), p. 31.

¹³⁵⁹ According to the ICRC commentary on the first Geneva Conventions, this clause ‘makes it absolutely clear that the object of the Convention is a purely humanitarian one, that it is in no way concerned with the internal affairs of states, and that it merely ensures respect for the few essential rules of humanity which all civilized

the responsibility of the government, by all legitimate means, to maintain and re-establish law and order in the state or to defend the national unity and territorial integrity'.¹³⁶⁰ In certain cases the situation could be clarified through UN resolutions stating that the in a particular conflict humanitarian rules contained in Article 3 are to be respected by both sides.¹³⁶¹

Nevertheless, Article 3 provides civilians the same protection equivalent to those granted to civilians in international armed conflicts. But as it has been stated that NSAGs do not benefit in any shape or form from POW status under the third Geneva Convention available to combatants in international conflicts. Common Article 3 makes a distinction between those engaged in hostilities and those who do not. However, Additional Protocol II, specifically mentions "civilian population", but does not define it.¹³⁶² In spite of this lack of a definition, civilians upon their participation in hostilities lose their protection.¹³⁶³

Furthermore, as mentioned above, the Martens clause reinforces the importance of customary international humanitarian law as well as obliging the parties to any armed conflict to act according to 'principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.¹³⁶⁴

This was confirmed by the decision of the ICJ in the *Nicaragua* case, in which the ICJ described Common Article 3 has been described as codification of customary international law, it says:

Article 3 which is common to all four Geneva Conventions of 12 August 1949, defines certain rules to be applied in armed conflicts of non-international law character. There is no doubt that in the event of international armed conflicts, these rule also constitute a minimum yardstick in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which,

nations consider as valid everywhere and under all circumstances and as being above and outside war itself". Pictet (ed.), *Commentary I, op. Cit.*, P. 60.

¹³⁶⁰ Additional Protocol II, Article 3(1); Green, 'The Contemporary Law of Armed conflict', *op. cit.*, p. 350; see generally Cassese, 'The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed conflict', *op. cit.*, p. 416.

¹³⁶¹ Clapham, 'Human Rights Obligations of NSA in Armed Conflict', *op. cit.*, p. 496.

¹³⁶² Additional Protocol II, Article 5(1)(b),(e).

¹³⁶³ Additional Protocol II, Article 13(3).

¹³⁶⁴ Martens Clause provides a minimum threshold of humanitarian treatment for combatants particularly in the absence of specific treaty provisions. It was first articulated in the preamble to The Hague Conventions of 1899 and 1907 concerning the Laws and Customs of War on Land and later incorporated into the four Geneva Conventions of 1949 and Additional Protocol I of 1977. However, the customary character of Martens clause was confirmed by ICJ in the case of *The Corfu Channel case: (The United Kingdom v Albania)* [1949] ICJ Rep, [22]; and more recently in the *Nuclear Weapon Advisory Opinion (Advisory Opinion on Legality of the Threat of Use of Nuclear Weapons)*, [1996] ICJ Rep 1, [78-87].

in the Court's opinion, reflect what the Court in 1949 called 'elementary consideration of humanity ...'¹³⁶⁵

It also emphasised that the rules contained in Common Article 3 reflected '*elementary considerations of humanity*', a term initially used in the *Corfu Channel*¹³⁶⁶ case which was decided in the same year as the Geneva Conventions were signed.¹³⁶⁷ Moreover, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case of *Tadic* accepted that Common Article 3 because of its universal compliance, is now part of customary international law and as a matter of law applies to both international and non-international armed conflict.¹³⁶⁸ Moir notes that the UK Military Manual, having been relied upon in its 1958 edition by the ICTY in *Tadic* as evidence of the customary status of war crimes and criminal responsibility in the course of an internal armed conflict, has in turn in its 2004 edition relied upon the *Tadic* decision as authority for customary law.¹³⁶⁹ An ICTY Trial Chamber had to rule on a defence motion on jurisdiction which held that the elements of the ICJ's decision in *Nicaragua v USA* amounted to a finding that the obligations and prohibitions contained in Common Article 3 reflected customary international law.¹³⁷⁰ Similar statements have been made by the International Criminal Tribunal for Rwanda (ICTR), in its *Akayesu* judgment upheld the same view:

'it is today clear that the norms of Common Article 3 have acquired the status of customary law in that most states, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of common Article 3.'¹³⁷¹

Moreover, some national courts have acknowledged the customary nature of obligations contained in Common Article 3, such as *Karadzic* case in the USA, in which the district court held, 'most fundamental norms of the laws of war, which binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents'.

¹³⁶⁵ *Case Concerning Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, Merits, [1986] ICJ Rep 14.

¹³⁶⁶ *Corfu Channel* (UK v. Albania) Merits, [1949] ICJ Rep 4, at 22.

¹³⁶⁷ C. Smith, 'Common Article 3 of the Geneva Conventions as a Minimum Standard in International Humanitarian Law', *Irish Student Law Review* 168 2005, p. 170.

¹³⁶⁸ *Prosecutor v Dusko Tadic*, Appeals Chamber Judgement,

¹³⁶⁹ Moir, 'Non-International Armed Conflict and Guerrilla Warfare', *op. cit.*, p. 331-332; see also 'The Manual of the Law of Armed Conflict', UK Ministry of Defence, *op. cit.*, pp. 397-398.

¹³⁷⁰ Decision on the Defence Motion on Jurisdiction, *Prosecutor v Tadic* (IT-94-1), Trial Chamber, 10 August 1995, at para 67.

¹³⁷¹ *Prosecutor v. Jean-Paul Akayesu* (Judgment) ICTR-96-4 (2 Sept. 1998) para 608; see also the Special Court of Sierra Leone, *Prosecutor v. Morris Kallon and Brima Bazzy Kamara* SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction, Lome Accord Amnesty (13 Mar 2004) para 47.

The main problem with implementation of Common article 3 is in the recognition of internal armed conflict as such by the state authorities, according to Moir:

‘The failure of the drafters to define the term “armed conflict not of an international character” allowed states reluctant to hinder their ability to deal with insurrection by accepting any international humanitarian obligations simply to deny the existence of armed conflict, and thus the applicability of international regulation’.¹³⁷²

There is a tendency among governments to find it less expedient to formally recognize existence of an armed conflict on their territory as long as possible they will portray the conflict as a mere internal strife.¹³⁷³ Moreover, recognition of an armed conflict is disadvantageous to the central governments for a variety of reasons. According to the UK Ministry of Defence, ‘states have been, and always will be reluctant to admit that a state of armed conflict exists’.¹³⁷⁴ This is in the light of the fact that, it will highlight the incompetence of the state to prevent such a conflict.¹³⁷⁵ Additionally, it will provide the rebels with much needed recognition as legal combatants, and by acknowledging the existence of conflict on their territory brings into force the most basic provisions of IHL which ultimately restrict states use of repressive measures.¹³⁷⁶ It is also worth mentioning that applicability of rules of IHL does not depend upon the *de facto* recognition of state of armed conflict, as highlighted by the ICRC:

“The ascertainment whether there is a non-international armed conflict does not depend on the subjective judgment of the parties to the conflict; it must be determined on the basis of objective criteria.”¹³⁷⁷

Therefore, since there is no set of conditions contained in the Common Article 3 as when it would apply, Moir is of the opinion that the onus of recognizing the existence of an armed conflict is still upon the discretion of the state hosting the conflict.¹³⁷⁸

Like Additional Protocol I, Additional Protocol II cannot be said to be customary law but certain provisions of Additional Protocol II unequivocally apply to non-international conflicts.¹³⁷⁹ The Appeals Chamber of ICTY has stated that only ‘the core’ of Additional

¹³⁷² Moir, ‘the Law of Internal armed Conflict’, *op. cit.*, p. 88.

¹³⁷³ J. Yoo, ‘Transferring Terrorists’, 79 *Notre Dame Law Review* 1183, (2004), p. 1197.

¹³⁷⁴ UK Ministry of Defence Manual, *op. cit.*, p. 384.

¹³⁷⁵ Solis, ‘The Law of Armed Conflict’, *op. cit.*, p. 102.

¹³⁷⁶ Cullen, ‘The Parameters of Internal Armed Conflict in international Humanitarian law’, *op. cit.*, p. 197.

¹³⁷⁷ ICRC Working Paper, http://www.igc.org/icc/html/icrc8_2e199990629.html (June 29, 1999).

¹³⁷⁸ Moir, ‘the Law of Internal Armed Conflict’, *op. cit.*, p. 45.

¹³⁷⁹ See R. Myren, ‘Applying International Law of War to Non-International Armed Conflicts: Past Attempts and Future Strategies’ (1990) 37 *NILR* 367.

Protocol II could be considered part of customary international law,¹³⁸⁰ a view reiterated by the ICTR.¹³⁸¹ Although it is beyond the remit of this study to consider exactly which provisions of Additional Protocol II are part of customary international law, there is agreement by and large that not all provisions of Additional Protocol II reflect customary international law.¹³⁸² Another factor which makes Additional Protocol II not declarative of customary international law is due to lack of ratification by some major states such as the USA and others which are currently embroiled in internal armed conflicts such as India, Iran, Iraq, Israel and Turkey to name a few. This particular factor ‘makes transformation of the Protocol’s provisions into customary law more difficult.’¹³⁸³ This is in spite of the fact that in 1990s a significant number of states involved in internal armed conflicts ratified Additional Protocol II, but this does not hide the poor record of compliance by the parties involved in internal armed conflicts. This prompted the UN Secretary General to specifically mention this issue in his report pursuant to the creation of the ICTR:

‘The Security Council has included within the subject matter jurisdiction of the Rwanda Tribunal international instruments regardless whether they were considered part of customary international law ... Article 4 of the Statute, accordingly includes violations of Additional Protocol II which as a whole, has not as yet been universally recognized as part of customary international law.’¹³⁸⁴

For the purpose of this study since none of the sovereign states under consideration are yet to ratify Additional Protocol II, Common Article 3 will be the basis of accountability of NSAGs under international law if they reach the threshold of intensity.

¹³⁸⁰ *Prosecutor v. Tadic*, IT-94-1, Appeals Chamber Decision on Jurisdiction (2 Oct. 1995), para. 117.

¹³⁸¹ *Prosecutor v. Jean-Paul Akayesu*, para. 608.

¹³⁸² For a recent pronouncement on the topic, see Henckaerts and Doswald-Beck, ‘Customary International Humanitarian Law’.

¹³⁸³ At present, 168 states are party to Additional Protocol I and 164 states to Additional Protocol II, Two state France and the Philippines have ratified Protocol II but not Protocol I. International Humanitarian Law: Treaties & Documents:

<http://www.cicr.org/ihl.nsf/CONVPRES?OpenView>.

¹³⁸⁴ Report of the United Nations Secretary General pursuant to para. 5 of Security Council Resolution 955, S/1995/134 (13 February 1995) para. 12.

Chapter 4 International law applicable to NSAGs

4.1 The legal status of NSAGs

Unlike the IHL rules on interstate armed conflict, there is no mention of a legal status of combatants, i.e. individuals who may take part and be targeted in intrastate armed conflict in treaty rules.¹³⁸⁵ An entity with legal personality defined under international legal regimes possesses rights and responsibilities and is able to enter into agreements with other subjects of international law, namely sovereign states.¹³⁸⁶ The central issue to this is whether there is any efficacy in assessing international legal personality of non-state actors, in particular, NSAGs.¹³⁸⁷ A range of factors need to be considered before it can be determined whether an entity has international legal personality and if so what rights and obligations apply in that particular case. While the development of certain status of non-state actors in the general international discourse such as in international environmental law¹³⁸⁸ their participation has largely been welcomed, the case of NSAGs embroiled in armed conflict is more of a concern.¹³⁸⁹

There is no pre-set of rights or duties that an entity would have to satisfy to be granted international legal personality. According to Heintze, generally, the legal status of non-state actors is determined by the domestic legal system of the state they are operating in.¹³⁹⁰ He contends that on the basis of the ICJ's judgement in the *Barcelona Traction*¹³⁹¹ case in which it was held that corporations have the 'nationality' of the state they are based in and the same can be said of NSAGs involved in internal armed conflicts.¹³⁹² It has been argued that

¹³⁸⁵ N. Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict', *IRRC*, vol. 87, no. 860, December 2005, p. 748.

¹³⁸⁶ Cassese, 'International Law', *op. cit.*, p. 71.

¹³⁸⁷ In recent years the topic has attracted new attention from foreign policy analyst, international lawyers and the popular press. See P. J. Simpson, 'Learning to Live with NGOs', *Foreign Policy*, Vol. 112 (1998), 82; Jessica Mathews, 'Power Shift: An Essay on Realism, Reality and the Future of International Relations', *Foreign Affairs*, vol. 76 (1997), 50; Paul Lewis, 'Not just Governments Make war and Peace', *New York Times*, 28 November 1998.

¹³⁸⁸ P. Sands, 'Principles of International Environmental Law', Cambridge U.P., 2nd ed., 2003, pp. 112-113; T. Jewell & J. Steele (ed.), 'Law in Environmental Decision Making: National, European, and International Perspectives', Oxford U.P., 1998, p. 236.

¹³⁸⁹ J. Kellenberger, 'International Humanitarian Law at the Beginning of the 21st Century, Addressed to 26th Roundtable on Current problems of International Humanitarian Law', San Remo, 5 September 2002; for text: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5e2c8v>

¹³⁹⁰ Heintze, 'Do Non-State Actors challenge International Humanitarian Law', *op. cit.*, p. 163.

¹³⁹¹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* ICJ Reports, the Hague 1970, pp. 42.

¹³⁹² Heintze, 'Do Non-State Actors challenge International Humanitarian Law', *op. cit.*, p. 163.

because of pluralism and diversity of legal subjects and the ever-changing nature of needs of the world community, a legal ‘personality is a relative phenomenon varying with the circumstances’.¹³⁹³

The non-exclusivity of legal subjects of international law was recognized as early as 1949 by the ICJ in the *Reparation* case opinion in which it dealt with the legal personality of international organizations. The Court held:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of states has already given rise to instances of action upon the international plane by certain entities which are not states.¹³⁹⁴

However, as Menon observes:

... A subject of international law need not be a state and its rights and duties need not be the same as those of the state. The fact that international organizations and individuals lack a certain capacity possessed by states does not necessarily mean that they are not subjects of international law.¹³⁹⁵

It goes without saying that under traditional international law NSAGs would not have enjoyed any legal personality, simply because only the sovereign states were the primary subjects of international law.¹³⁹⁶ On this point, Cassese opines that states and *insurgents* have long been ‘traditional’ subjects of international community and from its inception they have been the *dramatis personae* (the character of the play) on the international scene but only states enjoy *lucos standi* and are the bearer of international legal personality.¹³⁹⁷ But at the heart of the issue of NSAGs attaining international legal personality is the delicate question of ‘sovereignty of states’ in question as well as monopoly of coercive use of force.¹³⁹⁸ For a NSAG to be granted an international legal personality would inevitably result in

¹³⁹³ Shaw, ‘International Law’, *op. cit.*, p. 196.

¹³⁹⁴ There is no question that at the time the above statement by the ICJ was an acknowledgement of a sea change in the very nature of international relations and quite a departure from purely positivist approach to international law as well as the fact that from then on apart from states there were other actors in the international arena, albeit, not on the same legal standing as sovereign states. *Reparation of injuries Suffered in the Service of the United Nations, Advisory Opinion* (1949) 4 ICJ Rep. 178-179.

¹³⁹⁵ P.K. Menon, ‘Subjects of Modern International Law’, in *Hague Yearbook of International Law*, Vol. 3, Springer, 1991, p. 84-85; see also H. Lauterpacht & E. Lauterpacht, ‘International Law: Being the Collected papers of Hersch Lauterpacht’, *op. cit.*, p. 257.

¹³⁹⁶ J. Morgenthau, ‘Positivism, Functionalism and International Law’, (1940) 34 *AJIL*. 260.

¹³⁹⁷ Cassese, ‘International Law’, *op. cit.*, p. 71.

¹³⁹⁸ Ignatieff, ‘The Warriors’ Honour’, *op. cit.*, p. 106.

compromising of the host state's sovereignty (the state on whose territory the armed conflict is taking place). This is in the light of the fact that as discussed above the only condition that a NSAG could legitimately attain international legal personality in the past has been the exercise of the right to self-determination by NSAGs representing a distinct ethnic minority population in order to achieve statehood albeit through the process of decolonization which in today's global set up is very rare and increasing difficult to achieve.¹³⁹⁹ It is submitted that attaining a legal personality is based on 'participation plus some form of community acceptance',¹⁴⁰⁰ manifesting itself in recognition by the majority of sovereign states and assert belligerent rights on par with an international conflict.¹⁴⁰¹

In sum, in relation to NSAGs it is very unlikely that such armed groups would ever be granted international legal personality.¹⁴⁰² Unless, there has been substantial military success on the part of the insurgents (NSAG) in the conflict,¹⁴⁰³ which subsequently results in recognition of their belligerency by the host state, whose acts have been beyond the level of mere banditry that 'possesses an organized military force, an authority responsible for its acts' and has captured and administered a considerable part of the host state's territory could have international legal personality, however, not on par with a sovereign state.¹⁴⁰⁴ As emphasized by Dinstein:

If the rebels have failed to gain effective control over a significant part of their territory, if they are not led by a responsible quasi-governmental authority, and if hostilities are limited to episodic hit-and-run incidents, there is simply no point in pretending that the laws of interstate warfare can be implemented by them.¹⁴⁰⁵

This is in the light of the fact that 'structure is necessary for the activation and implementation of international norms.'¹⁴⁰⁶ However, if the NSAG does not meet the above conditions, even if it has used force proportionally, carry arms openly, wear identifiable uniform and limited its operation to military targets it will be at the mercy of host state's

¹³⁹⁹ Sundhya Pahuja, 'The Post-coloniality of International Law', *Harv. Int'l L.J.*, Vol. 46, No. 2, 2005, p. 5.

¹⁴⁰⁰ Shaw, 'International Law', *op. cit.*, p. 197.

¹⁴⁰¹ Brownlie, 'Principles of Public International Law', *op. cit.*, p. 63; Cassese, 'International law', *op. cit.*, p. 125; Green, 'The Contemporary Law of Armed conflict', *op. cit.*, p. 343-344;

¹⁴⁰² In *Prosecutor v Morris Kallon and Brima Buzzy Kamara (Jurisdiction) (the Lomé Amnesty case)*, the Special Court for Sierra Leone, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Appeal Chamber, 13 Mar 2004, para 37-48, the Special Court for Sierra Leone held that although the insurgents were bound by IHL, they do not enjoy legal personality, nor do their agreements with governments constitute binding treaties under international law; see also P. Kooijmans, 'The Security Council and Non-State Entities as Parties to Conflicts', *op. cit.*, pp. 333 & 338.

¹⁴⁰³ See A. Orford, 'The Destiny of International law' (2004) 17 *LJIL* 441, 459.

¹⁴⁰⁴ Pictet, *et al.*, 'Commentary on the Geneva Conventions of 12 August 1949', p. 36.

¹⁴⁰⁵ Y. Dinstein, 'the Geneva Protocols: A Step Forward or Backward?' 33 *Yearbook of World Affairs* 265 (1979), pp. 267-268, cited in Mushkat, 'Who May Wage War?', *op. cit.*, p. 112.

¹⁴⁰⁶ Cassese, 'International Law in a Divided World', *op. cit.*, p. 93.

criminal justice system.¹⁴⁰⁷ The best contemporary examples of this could be found in conflicts in Turkey, where the central government does not recognise an armed conflict in Kurdistan,¹⁴⁰⁸ and Russia has never recognised that an internal armed conflict has ever taken place in Chechnya in spite of a ruling by the Russian Constitutional Court in 1995 that Additional Protocol II was applicable.¹⁴⁰⁹ Nonetheless, since the resumption of hostilities in 1999, the Russian government has consistently maintained that the ‘operation’ in the Chechnya is conducted in accordance with the 1998 Law ‘On Fighting Terrorism’.¹⁴¹⁰ Furthermore, the international responsibility of NSAGs has already been addressed by the UN Security Council taking sanctions against such groups.¹⁴¹¹

4.2 International legal obligations of NSAGs under inter-state treaty law

In step with the state-centric nature of international law, NSAGs cannot be party to inter-state IHL treaties.¹⁴¹² This is in the light of the fact that only states can ratify or accede to such treaty law and NSAGs cannot be bound by Common Article 3 and Additional Protocol II on the basis of their own legal personality.¹⁴¹³ Article 1 Common to the Geneva Conventions clearly stipulates that only states can be party to these conventions, a principle also upheld by Additional Protocol II of 1977.¹⁴¹⁴ The legal justification most commonly advanced in relation to binding NSAGs to inter-state treaty law is the doctrine of legislative jurisdiction which was put forward by the Greek delegate during the 1949 Geneva conference.¹⁴¹⁵ In this

¹⁴⁰⁷ H. Lauterpacht (ed.), ‘Oppenheim’s International Law’, vol. II, *op. cit.*, p. 210-212.

¹⁴⁰⁸ S. Cayci, ‘Countering Terrorism and International Law: The Turkish Experience’ in ‘International Peacekeeping: The Yearbook of International Peace Operation’, H. Langholtz, B. Kondoch, (ed.), Martinus Nijhoff Publishers, 2003, pp. 333-348.

¹⁴⁰⁹ For an account of the evolution of legal qualification of the conflict in Chechnya see Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, pp. 127-133.

¹⁴¹⁰ A. Cherkasov and T. Lokshina, ‘Chechnya: 10 Years of Armed Conflict’, 16 *Helsinki Monitor* 143 2005, p. 144; L. Harding, ‘Russia end anti-terrorism operation in Chechnya’, *the Guardian*, 16 April 2009.

¹⁴¹¹ See SC Res. 1127 (1997), 1173 (1998), and 1221 (1998) (regarding UNITA), 942 (1994) (regarding the Republika Srpska), 1171 (1998) (concerning rebels in Sierra Leone), and to a certain extent SC res. (1992) (regarding Khmer Rouge).

¹⁴¹² Clapham, ‘Non-State Actors in Times of Armed Conflict’, *op. cit.*, p. 75.

¹⁴¹³ Zegveld, ‘The Accountability of Armed Opposition Groups in International Law’, *op. cit.*, p. 14; J-M Henkaerts, ‘Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law’, in ‘Proceedings of the Bruges Colloquium’, 2002, p. 127.

¹⁴¹⁴ Articles 20 and 22 of Additional Protocol II.

¹⁴¹⁵ Fourth Meeting of the Joint Committee, Final Records of the Diplomatic Conference Of Geneva of 1949, vol. II-B, p. 94; Elder, ‘The Historical Background of Common Article 3 of the Geneva Convention of 1949’, *op. Cit.*, p. 55; G. Draper, ‘The Geneva Conventions of 1949’ (1965) 114 *Recueil des Cours*, pp. 95-96; both Elder and Draper are in favor of this analysis. However in contrast to this analysis see Cassese who disagrees with this view of being based ‘on a misconception of the relationship between international and domestic law’, A. Cassese, ‘the Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts’, 1981, 30 *ICLQ* 416, p. 423.

regard, it has been stated that applicability of Common Article 3 and Additional protocol II depends very much on whether the host state to the conflict has ratified the said conventions and not the expressed declaration of NSAGs adhering to the IHL. On this point Zegveld notes:

Like armed opposition groups, individuals cannot accede to international treaties, they derive their international rights and obligations through the state under which jurisdiction they live. However, the international rules applicable to individuals are limited to prohibitions on committing a limited number of international crimes ... Common article 3 and Protocol II do not merely require armed opposition groups not to commit the most serious crimes.¹⁴¹⁶

Providing the state in question has ratified additional Protocol II then the NSAGs concerned will be automatically bound by the relevant norms laid down therein.¹⁴¹⁷ Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 25 May 2000¹⁴¹⁸ is indicative of such a binding force.¹⁴¹⁹ It has been suggested that this article clearly sets out the responsibility of a state for all entities under its jurisdiction.¹⁴²⁰

There are two particular situations which may apply to NSAGs involved in non-international armed conflict. At the heart of this approach is the dichotomy between NSAGs which act sporadically and do not hold any part of the territory and organised armed opposition groups which exercise administrative authority in a certain part of the territory that cannot be ignored by the central government as well as the international community at large. As stated above, Protocol II only applies to those armed groups which hold part of the territory of a state and in affect act as the *de facto* administrative authority of that part of the territory and would be bound by the said Protocol.¹⁴²¹ In the case of NSAGs do not control part of a territory of a state, they cannot be bound by Protocol II, however, they will be bound by Common article 3. According to Baxter the latter groups are only bound by international humanitarian law by the virtue of being inhabitants of the state that has ratified the relevant conventions.¹⁴²²

¹⁴¹⁶ Zegveld, 'the Accountability of Armed Opposition Groups in International Law', *op. cit.*, p. 14-15; see also Junod, *op. cit.*, 'Commentary Additional Protocol', p. 1338.

¹⁴¹⁷ Zegveld, *ibid.*

¹⁴¹⁸ For the text: <http://www2.ohchr.org/english/law/crc-conflict.htm>

¹⁴¹⁹ See D. Capie & P. Policze, 'Keeping the Promise of Protection: Holding Armed Groups to the Same Standard as States', The Armed Groups Project, University of British Columbia 2004, p. 2.

¹⁴²⁰ Heintze, 'Do Non-State Actors challenge International Humanitarian Law?', *op. cit.*, p. 164.

¹⁴²¹ R.R. Baxter, 'Jus in Bello interno: the Present and Future Law', in 'Law and Civil War in the Modern World', John N. Moore (ed.), The Johns Hopkins U.P., 1974, pp. 518, 527-8.

¹⁴²² Baxter, *ibid.*

Otherwise, members of NSAGs (which are loosely organized) will be subjected to the host state's criminal system.¹⁴²³

Even by reviewing state practice or decisions of quasi-judicial organs we are unable to fill the gap left by conventional law of non-international armed conflict on how to differentiate those who are to be protected from those who are to be the legitimate target of attack.¹⁴²⁴ However, the following passage by Bassiouni provides a realist view of legal norms applicable to NSAGs:

... The legal norms applicable to non-state actors are context specific. Therefore, there are differentiations between norms intended to protect the same social and human interests that depend upon the context, the participation, and who determines certain relevant legal facts in a given armed conflict.”¹⁴²⁵ He goes on to note: “The power of factual appreciation and legal characterization left to the states by IHL gives them power to determine legal outcomes pertaining to non-state actors, and that imbalance between state and non-state actors ultimately leads to non-compliance by both.”¹⁴²⁶

Later in the study it will be discussed whether this normative gap in internal armed conflict can be supplemented and/or filled by the IHRL to complement instruments of IHL.

The Palestinian war of 1948 was the first time the Security Council had to grapple with a non-state entity involved in armed conflict which took place between the Arab and Jewish militia forces¹⁴²⁷ as a result of termination of the British mandate of the Palestinian territory.¹⁴²⁸ At the time the conflict was between two non-states and no involvement of third state, although, some of the Arab states were indirectly involved, it was made absolutely clear that international peace and security were very much imperilled.¹⁴²⁹ As a result, without much deliberation, the Security Council called upon the Jewish Agency for Palestine and the Arab Higher Committee (both non-state entity) to bring about cessation of hostilities.¹⁴³⁰ However, the hostilities continued which prompted the Security Council to call upon ‘all persons and organizations in Palestine, and especially called upon the Arab Higher

¹⁴²³ Cassese, ‘International Law’, *op. cit.*, p. 125.

¹⁴²⁴ Kleffner, ‘From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities’, *op. cit.*, p. 324.

¹⁴²⁵ Bassiouni, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors’, *op. cit.*, p. 743.

¹⁴²⁶ Bassiouni, *ibid.*

¹⁴²⁷ See J.B. Whisker, ‘The Militia’, Edwin Mellen Press, 1st ed., 1992.

¹⁴²⁸ P.H. Kooijmans, ‘The Security Council and Non-State Entities as Parties to Conflicts’, *op. cit.*, p. 334; for legal assessment of the said conflict see also W.R. Louis, ‘The British Empire in the Middle East, 1941-1951’, quoted in Shabtai Rosenne, ‘International Law Miscellany’, Martinus Nijhoff Publishers, 1993, p. 714; J. Allain, ‘International Law in Middle East: Closer to Power than Justice’, Ashgate, illustrated edition, 2004, p. 98.

¹⁴²⁹ *Ibid.*

¹⁴³⁰ Security Council Res. 43 (1948) of 1 April 1948.

Committee and the Jewish Agency to take certain measures.’¹⁴³¹ Kooijmans notes that ‘since the Jewish Agency was the forerunner of the future provisional Israeli government, it can hardly be compared to a normal non-state party in an internal conflict’.¹⁴³² This is in the light of the fact that subsequently Israel proclaimed independence and the conflict evolved from an internal into an inter-state one.

4.3 International criminal law¹⁴³³

There is no doubt that individual criminal responsibility for serious abuse of the IHL, or war crime is clearly established as part of international law.¹⁴³⁴ According to Lachs, a war crime is committed ‘during and in connection with an armed conflict under especially favourable conditions, created by the war and facilitating its commission.’¹⁴³⁵ Hence, in the context of non-international armed conflicts it is even more crucial to establish the connection between the conduct in question and the continuing armed conflict in order to determine whether an individual is to be tried under domestic or international law.¹⁴³⁶ Until recently, according to the state of international law and the unanimous opinion of legal literature war crimes only took place in international armed conflict and not in the case of internal armed conflict.¹⁴³⁷ Indicative of this approach is what Plattner claimed that, ‘international humanitarian law applicable to non-international armed conflict does not provide for individual penal responsibility.’¹⁴³⁸

¹⁴³¹ Security Council Res. 46 (1948) of 17 April 1948.

¹⁴³² Kooijmans, ‘The Security Council and Non-State Entities as Parties to Conflicts’, *op. cit.*, p. 334; see also ‘The United Nations and Israel’s War of Independence’.

¹⁴³³ See generally A. Cassese, ‘International Criminal Law’, Oxford U.P., 2nd ed., 2008; M.C. Bassiouni, ‘International Criminal Law: Sources, Subjects and Contents’, *op. cit.*; A. Zahar & G. Sluiter, ‘International Criminal Law: a Critical Introduction’, Oxford U.P., 1st ed., 2007.

¹⁴³⁴ The Nuremberg and Tokyo trials paved the way for the establishment of individual criminal responsibility under international law as Article 9 of the Nuremberg Charter clearly illustrates. The principle of direct individual criminal responsibility under international criminal law was confirmed by the United Nations General Assembly on 11 December 1946 in the so-called Nuremberg principles, UN Doc. G.A. Res. 95(1) A/236 (1946) Affirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal; La Haye, ‘War Crimes in Internal Armed Conflict’, *op. cit.*, p. 110.

¹⁴³⁵ M. Lachs, ‘War Crimes, an Attempt to Define the Issue’, London: Stevens, 1945, p. 100.

¹⁴³⁶ La Haye, ‘War Crimes in Internal Armed Conflict’, *op. cit.*, p. 110.

¹⁴³⁷ L. Condorelli, ‘War Crimes and Internal Conflicts in the Statute of the International Criminal Court’, in ‘The Statute of the International Criminal Court: A Challenge to Impunity’, M. Politi & G. Nesi (ed.), Ashgate: Dartmouth, 1998, pp. 107-117, p. 108.

¹⁴³⁸ D. Plattner, ‘The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts’, 278 *IRRC* 409, 414 (1990).

Consequently, IHL provisions on prosecution of war crimes in internal armed conflict were largely ignored until 1990s.¹⁴³⁹ Moreover, IHL applicable in non-international armed conflict has long been hindered by the lack of an universal supervisory body to suppress serious violations of its provisions.¹⁴⁴⁰ Some attribute this to strong historical sovereignty-oriented interests of states, their reluctance to compromise their sovereignty and exclusive competences as well as criminalising such acts under international law.¹⁴⁴¹ As Meron observes ‘the sovereignty of states and their insistence on maintaining maximum discretion with those who threaten their ‘sovereign authority’ have combined to limit the reach of international humanitarian law applicable to non-international armed conflict.’¹⁴⁴² Furthermore, in a world where most of armed conflicts take place within the borders of a single state (at least to start with), there is a growing humanitarian concern for the protection of victims in such armed conflicts.¹⁴⁴³ Therefore, ‘it was precisely in internal armed conflicts that national criminal justice systems were in all likelihood unable to adequately respond to violations of such norms.’¹⁴⁴⁴ As a consequence, in recent decades there has been a rapid development in regulation of internal armed conflict manifesting itself in the enunciation and recognition of an expanding body of norms regarding internal armed conflict but also international law has clearly moved towards much greater criminalization of those norms.¹⁴⁴⁵ It had finally become ‘untenable to argue that the perpetrators of atrocities committed in non-international armed conflict should be shielded from international justice.’¹⁴⁴⁶

4.3.1 The nexus between war crime and armed conflict

In recent years the concept of internal armed conflict in contemporary international humanitarian law has been fashioned greatly by the jurisprudence of Quasi-Judicial bodies such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the

¹⁴³⁹ Sassoli, ‘The Implementation of International Humanitarian Law: Current and Inherent Challenges’, *op.cit.*, p. 53.

¹⁴⁴⁰ D. Momtaz, ‘War Crimes in Non-International Conflicts Under the Statute of the International Criminal Court’, *YIHL*, Vol. 2, 1999, pp. 177-192, p. 177.

¹⁴⁴¹ Robinson & Von Hebel, ‘War Crimes in International Conflicts: Article 8 of the ICC Statute’, *op. cit.*, p. 193.

¹⁴⁴² T. Meron, ‘International Criminalization of Internal Atrocities’ 89 *AJIL* (1995) pp. 554- 577, p. 544.

¹⁴⁴³ See H.D.T. Gutierrez-Posse, ‘The Relationship between International Humanitarian Law and International Criminal Law’, *IRRC*, Vol. 88, No. 861, March 2006, pp. 65-86.

¹⁴⁴⁴ H. Von Hebel & D. Robinson, ‘Crimes in the Jurisdiction of the Court’ in ‘the International Criminal Court: the Making of the Rome Statute’, R.S. Lee (ed.), Brill, 1999, p. 105.

¹⁴⁴⁵ T. Meron, ‘Is International Law Moving Towards Criminalization?’ 9 *EJIL* (1998), pp. 18-31, p. 30.

¹⁴⁴⁶ Lawyers Committee for Human Rights, Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute (1998), available at <http://www.iccnw.org/documents/LCHRUNresolvedIssues.pdf>, Section IV.

International Criminal Tribunal for Rwanda (ICTR) set up as a result of the atrocities committed during bloody conflicts in the former Federal Republic of Yugoslavia¹⁴⁴⁷ and Rwanda.¹⁴⁴⁸ The UN Security Council established these tribunals respectively.¹⁴⁴⁹ The significance of these tribunals according to Shaw is that they came about as a result of the use of authority of the UN Security Council to adopt decisions binding upon all member states under Chapter VII of the Charter, quite a contrast to the subsequent creation of the International Criminal Court (ICC) which was created as result of an international conference.¹⁴⁵⁰ Individual criminal responsibility for violations of norms related to international armed conflict was firmly established in international law in Tokyo and Nuremberg judgements and was further expanded upon through the grave breaches provisions of the Geneva Conventions of 1949 and of Additional Protocol of 1977.¹⁴⁵¹ In the meantime, scholars such as Meron advocated that there was no moral justification or persuasive legal argument to treat perpetrators of atrocities related to internal armed conflict more leniently than those of international armed conflicts.¹⁴⁵² Nonetheless, in step with the traditional approach, the draft Statute of the ICTY defined crimes limited to “rules of international humanitarian law which are beyond any doubt part of customary law”¹⁴⁵³ in line with crimes which had their basis in norms related to international armed conflict.¹⁴⁵⁴ The same approach was adopted during the course of establishing the ICTR and the United Nations Commission of Experts similarly reiterated that war crimes were limited to

¹⁴⁴⁷ For the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, see UN Doc. S/25704, Annex, 32 *ILM* 1192 (1993).

¹⁴⁴⁸ For the Statute of the International Criminal Tribunal for Rwanda (ICTR) was established on the basis of UN Security Council Resolution 955, 8 November 1994; For the Statute of the Tribunal for Rwanda, 33 *ILM* 1602 (1994).

¹⁴⁴⁹ See e.g. W. Schabas, ‘The UN International Criminal Tribunal for Former Yugoslavia, Rwanda and Sierra Leone’, Cambridge U.P., 2006; J.R.W.D. Jones, ‘The Practice of International Criminal Tribunals for the Former Yugoslavia and Rwanda’, Transnational Publishers, 1997; G. Sluiter & A. Klip, ‘Annotated Leading Cases of International Criminal Tribunals. 2: the International Criminal Tribunal for Former Yugoslavia 1993-1998’, Antwerpen: Intersentia, 2001; G. Sluiter & A. Klip, ‘Annotated Leading Cases of International Criminal Tribunals. 2: the International Criminal Tribunal for Rwanda 1994-1999’, Antwerpen: Intersentia, 2001.

¹⁴⁵⁰ Shaw, ‘International Law’, *op. cit.*, p. 403.

¹⁴⁵¹ Nonetheless, international criminal tribunals related to internal armed conflict are a very new phenomenon in international law, which, until the early 1990s the question remained whether there was basis for individual criminal responsibility for such norms. D. Robinson & H. Von Hebel, ‘War Crimes in International Conflicts: Article 8 of the ICC Statute’, *YIHL*, Vol. 2, 1999, pp. 193-209, p. 195.

¹⁴⁵² T. Meron, ‘International Criminalization of Internal Atrocities’, *AJIL*, pp. 554-577, (1999), p. 561.

¹⁴⁵³ Art. 2 incorporate the grave breaches of the Geneva Conventions of 1949, and Art. 3 (violations of the laws or customs of war) was based on the Hague Regulations of 1907; UN Doc. S/25704 (3 May 1993).

¹⁴⁵⁴ See Report of the Secretary General Pursuant to paragraph 1-2 of SC res. 808 (1993) UN Doc. S/25704 (3 May 1993) at para. 34 and 41-44.

international armed conflicts.¹⁴⁵⁵ The inadequacy of this definition however was exposed during the debate in the Security Council which prompted the three permanent members of the Council namely France, United Kingdom and the United States to propose a much wider interpretation to the relevant provisions that would also cover norms relating to internal armed conflict.¹⁴⁵⁶ However in a departure from this approach, article 4 of the ICTR's 1994 statute was said by the UN Secretary General to constitute a provision which, 'for the first time criminalizes [violations of] Common Article 3'.¹⁴⁵⁷ It is not surprising that in the *Prosecutor v. Duško Tadić* the very first case to be heard by the ICTY the defence submitted that international law did not provide for individual criminal responsibility for violations of IHL in non-international armed conflicts.¹⁴⁵⁸ To its lasting credit, and as a reaction to widespread international consensus the Tribunal yielded to the reality and adopted a more contemporary approach by holding that, '... customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife'.¹⁴⁵⁹ This approach has since been affirmed in the *Čelebići* case in which the Trial Chamber stated, 'the fact that the Geneva Conventions themselves do not expressly mention that there shall be criminal liability for violations of Common Article 3 clearly does not in itself preclude such liability'.¹⁴⁶⁰ In fact, even more recently the Study on Customary International Humanitarian law carried out by the ICRC has also maintained that serious violations of IHL constitute war crimes regardless of whether committed in international or non-international armed conflict, and that both classifications of war crimes result in individual criminal responsibility.¹⁴⁶¹

¹⁴⁵⁵ In relation to the said tribunals and their approach to war crimes in non-international armed conflict, Werle notes that "as late as March 1993, in a commentary to the ICTY Statute, The International Committee of Red Cross concluded that the concept of war crimes was limited to international armed conflicts. Only in 1994, with the creation of the International Criminal Tribunal for Rwanda, did the international community apply international criminal law to an armed conflict with few international aspects." G. Werle, 'Principles of International Criminal Law', TMC: Asser Press, 2005, pp. 282-283; Preliminary remarks of the ICRC (25 March 1993), unpublished: Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, UN Doc. S/1994/674, 27 May 1992, at 52.

¹⁴⁵⁶ UN Doc. S/PV.3217 of 25 May 1993, p. 11 (France), p. 15 (US), and 19 (UK); Robinson & Von Hebel, 'War Crimes in International Conflicts: Article 8 of the ICC Statute', *op. cit.*, p. 18.

¹⁴⁵⁷ See Report of the Secretary General Pursuant to Paragraph 5 of Security Council 955, UN Doc. S/1995/134, 13 February 1995, at 12.

¹⁴⁵⁸ L. Moir, 'Grave Breaches and Internal Armed Conflict', *JICJ* 7 (2009), 763-787, p. 767.

¹⁴⁵⁹ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-95-1), Appeals Chamber, 2 October 1995, para. 134.

¹⁴⁶⁰ *Prosecutor v. Delalic, et al.*, Judgement (IT-96-21-T), para. 308.

¹⁴⁶¹ Henkaerts & Doswald-Beck, 'The Study on Customary IHL', *op. cit.*, pp. 551-555 & 568-603.

As a consequence, the ICTY in the abovementioned case dealing with the armed conflict in the Former Yugoslavia had to pay particular attention to this relationship between the conduct of the culprit and the on-going armed conflict.¹⁴⁶² The Trial Chamber held that ‘there must be an obvious link between the criminal act and the armed conflict ... it is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.’¹⁴⁶³ The same Trial Chamber affirmed the fact that a war crime could be committed even if ‘substantial clashes were not occurring in the region at the time and place’ where the crimes were allegedly committed,¹⁴⁶⁴ an approach endorsed by the ICTY Appeals Chamber.¹⁴⁶⁵

The Appeals Chamber also held that Article 3 of the ICTY Statute encapsulated all violations of humanitarian law not coming under Article 2, 4 or 5, more precisely, violations of the Hague Law on international conflicts, violations of provisions of the Geneva Conventions other than those classified as “grave breaches” by those Conventions, infringement of Common Article 3 and other customary rules regarding internal armed conflicts, as well as violation of agreements binding on the parties of the conflict *quo treaty law*.¹⁴⁶⁶

The creation of the Rwanda Tribunal (ICTR) has also made a telling contribution to this trend by the virtue of Article 4 of the Statute which recognizes criminal responsibility for serious violations of Common Article 3 and certain elements of Additional Protocol II.¹⁴⁶⁷ Therefore, according to Moir, due to the above developments and significant expansion of relevant customary international law, with regard to criminal responsibility, also now renders it beyond dispute that violations of the laws and customs regulating non-international armed conflict can represent war crimes.¹⁴⁶⁸

¹⁴⁶² The decision of the tribunal in the case of *Prosecutor v. Dusko Tadic* has set out the parameters of internal armed conflict; Case No. IT-94-1-AR72 (2 October 1995).

¹⁴⁶³ *Tadic* Trial, Case No. IT-94-1 – ICTY, para. 573; According to Moir in relation to NSAGs: “The most innovative development regarding the laws of internal armed conflict was brought about by the *Appeals Chamber of the ICTY in Prosecutor v Tadic* (Appeals Jurisdiction), and particularly in the part of the judgement dealing with Article 3 of the Tribunal’s Statute, which is concerned with ‘violations of the laws or customs of war’; Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 134-135; See M.P. Scharf, ‘Balkan Justice: The Story Behind the First International War Crimes Trial since Nuremberg’, Carolina U.P., 1997; J.E. Alvarez, ‘Nuremberg Revisited: the *Tadic* Case’ (1996) 7 *EJIL* 245-264; Aldrich, G.H., ‘Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia’ (1996) 90 *AJIL* 64.

¹⁴⁶⁴ *Tadic* (IT-94-1-AR72), Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

¹⁴⁶⁵ *Kunarac*, Appeal Chamber ICTY, (IT-96-23 & IT-96-23/1 – A), para. 57.

¹⁴⁶⁶ In this case it was concluded that the ICTY was the first truly unique international tribunal to be established by the UN which has determined an individual’s guilt or innocence in connection with serious violations of international humanitarian law the first international war crime tribunal since Nuremberg; *Prosecutor v Tadic* (Jurisdiction) (1996) 35 *ILM* 35, para 89.

¹⁴⁶⁷ Robinson & Von Hebel, ‘War Crimes in International Conflicts: Article 8 of the ICC Statute’, *op. cit.*, p. 18.

¹⁴⁶⁸ Moir, ‘Non-International Armed Conflict and Guerrilla Warfare’, *op. cit.*, p. 323.

4.3.2 The Statute of the International Criminal Court (ICC)

As noted above, due to horrific atrocities committed in the Former Yugoslavia and Rwanda resulted in creation of two *ad hoc* criminal tribunals under the auspices of the UN Security Council which had the competence of prosecuting all individuals including non-state actors who had committed crimes falling within their jurisdiction eventually resulted in the creation of the Statute of the International Criminal Court in (ICC) 1998, under which serious violations of the laws and customs applicable in armed conflicts would be under the jurisdiction of the Court.¹⁴⁶⁹

Nevertheless, prior to these Tribunals, there were other developments which had a tangible influence on the eventual creation of the Statute of the ICC. Namely, the decision by the ICJ in the much cited *Nicaragua* case in which the ICJ held that it considered Common Article 3 of the Geneva Convention of 1949 as an expression of ‘elementary considerations of humanity’, applicable as a *yardstick* to all kind of conflict.¹⁴⁷⁰ A similar approach was adopted by the International Law Commission (ILC) in the First Draft of the Code of Crimes against the Peace and Security of Mankind in 1991 which was revised in 1996, including ‘exceptionally serious war crimes’ which applied to all kinds of conflicts.¹⁴⁷¹ It must be noted that the first draft of the said report only referred to war crimes related to international armed conflict; assimilated to them were conflict in terms of Article 1(4) of additional Protocol I of 1977 and wars of national liberation.¹⁴⁷² Nevertheless, the Statute of the International Criminal Court (ICC),¹⁴⁷³ adopted in July 1998, has been heralded as a vital development in the laws of internal armed conflict relating to NSAGs due to its universal acceptance and clear manifestation of state practice reflected by the number of national delegates.¹⁴⁷⁴

The ICC was the outcome of a long and protracted battle against impunity for particular heinous crimes committed in grave breaches of the Geneva Conventions (the so-called ‘war

¹⁴⁶⁹ Report of the International Law Commission on the Work of its 46th Session. General assembly Official Records, Supplement Nr. 10. Doc. A/46/10 (1994). See also J. Crawford, ‘ILC Adopts a Statute for an International Criminal Court’, 89 *AJIL*. (1995), pp. 404-416.

¹⁴⁷⁰ *Case Concerning Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, Merits, [1986] ICJ Rep, p. 114.

¹⁴⁷¹ Report of the International Law Commission at the forty-fourth session of the UN General Assembly, (1991) UN Doc. A/46/10, p. 270 (commentary on draft article 22); Robinson & Von Hebel, ‘War Crimes in International Conflicts: Article 8 of the ICC Statute’, *op. cit.*, p. 18.

¹⁴⁷² Plattner, ‘The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts’, *op. cit.*, p. 409.

¹⁴⁷³ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 of 17 July 1998, reprinted in: *ILM*, vol. 37, 1998, 999 [hereinafter Rome Statute]

¹⁴⁷⁴ Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 160.

crimes')¹⁴⁷⁵ and other international humanitarian law treaties committed in both international and non-international armed conflict.¹⁴⁷⁶ Article 8(2)(c) of the ICC Statute is of particular significance to this study, which establishes the Court jurisdiction over serious violations of Common Article 3 and specifies these offences as war crimes:

In the case of an armed conflict not of an international character, serious violations of Article 3 Common to the Four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilations, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.¹⁴⁷⁷

At the same time as Article 8(2)(e) grants jurisdiction over other serious violations of the laws and customs applicable to non-international armed conflicts which includes provisions of Additional Protocol II considered to represent customary international law.¹⁴⁷⁸ The Statute of the ICC Court also includes acts committed as part of widespread and systematic attacks against civilian populations as crimes against humanity outside armed conflict/war situation.¹⁴⁷⁹ The Statute of ICC purports to reflect custom by restricting its jurisdiction in Article 5 to 'the most serious crimes of concern to the international community as a whole.'¹⁴⁸⁰ It is worth noting that the said Article not only includes violations of Common Article 3 and several violations of Additional Protocol II, but also from a tangible number of provisions drawn from the rules of international armed conflict.¹⁴⁸¹ Hence, Von Hebel notes

¹⁴⁷⁵ Article 8, Rome Statute; see also W. Schabas, 'International Criminal Court: A Commentary on the Rome Statute', Oxford U.P., 2010.

¹⁴⁷⁶ See M.C. Bassiouni (ed.), 'Legislative History of the statute of the International Criminal Court: Legislative History, 1994-2000', Transnational Publishers, 2005.

¹⁴⁷⁷ Article 8(2)(c), Rome Statute.

¹⁴⁷⁸ Article 8(2)(e), Rome Statute.

¹⁴⁷⁹ Article 7, Rome Statute.

¹⁴⁸⁰ Article 5, Rome Statute.

¹⁴⁸¹ See Article 8(2)(c) deals with violations of Common article 3, and Article 8(2)(e) with other violations of the laws and customs of non-international armed conflict.

that the approach adopted by the ICC is consistent with ‘the general blurring of the fundamental differences between international and internal armed conflict.’¹⁴⁸²

Nowadays, those who violate international humanitarian law in armed conflict regardless of whether fighting for states or NSAGs, must now be expected to face prosecution not only before domestic but also international courts.¹⁴⁸³ However, Sassoli issues a sobering note of caution:

Once the ICC Statute has been universally accepted and the ICC functions effectively without too much interference by the UN Security Council and its permanent members, this geographical limitation will be overcome. The very credibility of international justice depends on this: justice which is not the same for everyone is not justice ... International Humanitarian Law cannot be fully credible, in the eyes of international public opinion and in particular in the eyes of those who sympathize with the perpetrators in the former Yugoslavia and Rwanda or with victims in Palestine, Lebanon or Chechnya, as long as a war criminal from Israel, Lebanon or Russia are not equally brought to trial ... another material limitation is a result of the understandable policy of the ICC Prosecutor to concentrate upon the most large-scale and the most representative crimes.¹⁴⁸⁴

However, the question of criminal sanctions remains at the centre of IHL, and perpetrators must expect sanctions whenever serious violations are taking place regardless of the legal characterization of the armed conflict and the legal status of the NSAGs involved.¹⁴⁸⁵

4.3.3 NSAGs, War crimes and international law

Throughout the negotiating process of the Rome Statute there was a general unanimity amongst the participating states that serious violations of the laws and customs of war had to be included.¹⁴⁸⁶ As noticed above, it is in internal armed conflicts that humanitarian considerations are most often cruelly ignored and domestic criminal systems are more likely

¹⁴⁸² Von Hebel & Robinson, ‘Crimes in the Jurisdiction of the Court’, *op. cit.*, p. 125.

¹⁴⁸³ O. Triffterer, ‘The Preventive and the Repressive Function of the International Criminal Court’, in ‘The Statute of the International Criminal Court: A Challenge to Impunity’, *op. cit.*, p. 137.

¹⁴⁸⁴ Sassoli, ‘the Implementation of International Humanitarian Law: Current and Inherent Challenges’, *op. cit.*, pp. 53-54.

¹⁴⁸⁵ A.M. La Rosa & C. Wuerzner, ‘Armed Groups, Sanctions and the Implementation of International Humanitarian Law’, *IRRC*, Vol. 90, No. 870, June 2008, pp. 327-341, p. 341.

¹⁴⁸⁶ Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 163; see also Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume 1, UN Doc. A/51/22 (13 September 1996), at para. 74.

to be found wanting to respond to violations.¹⁴⁸⁷ According to Momtaz regarding protection of the civilians:

Two principles of international humanitarian law, identified by the General Assembly as applying to non-international armed conflicts, seems to exist: the principle prohibiting attacks on the civilian population as such and the obligation to distinguish between combatants and non-combatants and to spare the latter as much as possible. Recent practice of the Security Council is the best proof of the existence of an *opinio juris* relative to criminalization of the violation of these rules during these conflicts.¹⁴⁸⁸

When we discuss the concept of crimes we are basically concerned with crimes committed in the course of armed conflict that are punishable under international law.¹⁴⁸⁹ Although some of the acts constituting war crimes are only applicable to international conflicts,¹⁴⁹⁰ but many of the acts prohibited as war crimes also happen in internal armed conflict.¹⁴⁹¹

There is no doubt that criminalization of serious war crimes in non-international armed conflict is an indication of the growing convergence of the IHL and HRL, where the international community is prepared to go beyond the mere monitoring and reporting on human rights violations and punish those who commit gross human rights violations. The growing convergence of IHL and HRL in the context of war crimes is best illustrated in situations where there is uncertainty regarding establishing whether the strife is a fully-fledged armed conflict or not.¹⁴⁹²

Nonetheless, the Appeals Chamber of ICTY in *Tadić* had to decide whether based on customary IHL it was within its competences to incriminate any crimes committed in the course of an internal armed conflict.¹⁴⁹³ It found that ‘general principles governing the conduct of hostilities (the so-called “Hague Law”)’ apply to non-international armed conflicts.¹⁴⁹⁴ This approach paved the way for the Appeals Chamber to criminalize violations of a rule of IHL committed in the course of non-international armed conflict.¹⁴⁹⁵ The Appeal Chamber held that with a view to establish the existence of such responsibility, one has to be

¹⁴⁸⁷ Robinson & Von Hebel, ‘War Crimes in International Conflicts: Article 8 of the ICC Statute’, *op. cit.*, p. 199.

¹⁴⁸⁸ Momtaz, ‘War Crimes in Non-International Conflicts Under the Statute of the ICC’, *op. cit.*, pp. 184-185.

¹⁴⁸⁹ J. Dugard, ‘War Crimes in Internal Conflicts’, *Israel Yearbook on Human Rights*, 28, 91-96 (1999), p. 91.

¹⁴⁹⁰ H. Jescheck, ‘War Crimes’ in ‘Encyclopaedia of Public International Law’, No. IV, R. Bernhardt (ed.), North-Holland Publishing Company, 1982, p. 294.

¹⁴⁹¹ Dugard, ‘War Crimes in Internal Conflicts’, *op. cit.*, p. 91.

¹⁴⁹² Dugard, ‘War Crimes in Internal Conflicts’, *op. cit.*, p. 95.

¹⁴⁹³ Momtaz, ‘War Crimes in Non-International Conflicts Under the Statute of the ICC’, *op. cit.*, p. 189.

¹⁴⁹⁴ *Tadić*, Jurisdiction Decision, *op. cit.*, paras. 118, 119, 127.

¹⁴⁹⁵ Momtaz, ‘War Crimes in Non-International Conflicts Under the Statute of the ICC’, *op. cit.*, p. 189

able to deduce from state practice that the intention to criminalize such behavior exists.¹⁴⁹⁶ The Appeals Chamber also did query whether a practice in favor of all “grave breaches” recognized by the Geneva Conventions and Additional Protocol I committed in non-international armed conflict existed.¹⁴⁹⁷ It held that although there was a movement towards criminalization of such acts in non-international armed conflict, but rejected the idea that “grave breaches” could qualify as serious violations of IHL committed during non-international armed conflicts.¹⁴⁹⁸ However, this view was rejected by Judge Abi-Saab, who was of the opinion that practice and *opinio juris* of states indicate the extension of the regime of grave breaches to crimes committed during non-international armed conflicts.¹⁴⁹⁹ According to La Haye, ‘the adoption of the ICC Statute giving the court jurisdiction over war crimes committed in internal armed conflicts has created a new impetus for states to include such crimes within their own domestic legislation.’¹⁵⁰⁰ Although the ICC Statute does not provide any obligation for the states to do so but certainly in the Preamble it does encourages them in that direction affirming that, ‘the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.’¹⁵⁰¹ One of the best indications of this extension is the Belgian Law of 16 June 1993 which was abrogated and the laws of 23 April 2003 and 5 August 2003 amending the criminal code,¹⁵⁰² which grants universal jurisdiction in relation to grave breaches of IHL regardless of whether committed in an international or non-international armed conflict.¹⁵⁰³ Moreover, recently adopted military manuals can also be a good indication of this trend within the international community.¹⁵⁰⁴ The 2004 UK Manual of the law of armed conflict for instance is a good indication of the evolving military practice in this area of law which states, ‘although the treaties governing internal armed conflicts contain no grave breach provisions,

¹⁴⁹⁶ *Tadic*, Jurisdiction Decision, *op. cit.*, *ibid*, para. 128.

¹⁴⁹⁷ Momtaz, ‘War Crimes in Non-International Conflicts Under the Statute of the ICC’, *op. cit.*, p. 189

¹⁴⁹⁸ *Tadic*, Jurisdiction Decision, *op. cit.*, paras. 89; see also Meron, ‘the Continuing Role of Custom in International Humanitarian Law’, 90 *AJIL* (1996) p. 243.

¹⁴⁹⁹ This was also the position adopted by the United States in its *Amicus Curiae* Brief Presented by the Government of the United States of America (Dusko Tadic, Case No: IT-94-1-T) (25 July 1995); Momtaz, ‘War Crimes in Non-International Conflicts Under the Statute of the ICC’, *op. cit.*, p. 189; A. Cassese, ‘The International Criminal Tribunal of the Former Yugoslavia and the Implementation of International Humanitarian law’, in the United Nations and International Law in *Studi Panzera*, Bari, 1995, I, p. 239.

¹⁵⁰⁰ La Haye, ‘War Crimes in Internal Armed Conflict’, *op. cit.*, p. 157.

¹⁵⁰¹ See the Preamble to the ICC Rome Statute.

¹⁵⁰² The forerunner of this law was the Law of June 16, 1993 (As Amended by the Law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law, Published *Belgisch Staatsblad* (1993); also reprinted in an official English Translation in *YIHL*, vol. 2, 1999, pp. 177-192.

¹⁵⁰³ La Haye, ‘War Crimes in Internal Armed Conflict’, *op. cit.*, p. 154.

¹⁵⁰⁴ Momtaz, ‘War Crimes in Non-International Conflicts Under the Statute of the ICC’, *op. cit.*, p. 190.

customary law recognizes the serious violations of these treaties can amount to punishable war crimes. It is now recognized that there is growing area of conduct that is criminal in both international and internal armed conflict.¹⁵⁰⁵

4.4 NSAGs, battlefield status and regulation of force

4.4.1 Combatants in international law

To ascertain whether an individual is a combatant is vital to two separate stages of the conflict – on the one hand whether she/he could be targeted lawfully in the course of fighting and on the other, if she/he would be entitled to prisoner of war status upon capture. In international law the phrase “combatant” refers to those who can partake in an international armed conflict. The distinction between combatant and civilian status has been characterised not only as one of the fundamental principles of international humanitarian law but also one of its greatest achievements.¹⁵⁰⁶ The distinction between combatants and civilians has played a major role historically and culturally in creation of a body of law based on a humanist view regulating military conduct in war.¹⁵⁰⁷ IHL is based on a fundamental principle of distinction between combatants and civilians,¹⁵⁰⁸ and to ensure that in every feasible manner the armed conflicts are waged among combatants of the belligerent parties subject to certain limitations.¹⁵⁰⁹ In recent years, the International Court of Justice has described the principle of distinction as a cornerstone of IHL from its early codification efforts resulting in the 1907 Hague Regulations.¹⁵¹⁰ The Commentary to Protocol I states that the rule of protection and distinction is:

The foundation on which the codification and the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military

¹⁵⁰⁵ The UK Military Manual of the Law of Armed Conflict, *op. cit.*, para. 15.32 & 15.32.1.

¹⁵⁰⁶ L. Nurick, ‘The Distinction Between Combatants and Non-Combatants in the Law of War’, 39 *AJIL* 680

¹⁵⁰⁷ Green, ‘The Contemporary Law of armed Conflict’, *op. cit.*, pp. 20-23.

¹⁵⁰⁸ The theory of combatants’ privilege was traditionally based on the perception that wars are conflicts between public entities namely states and not between individuals. J-J Rousseau is often cited for the classical statement of this position: “War is not, therefore, a relation of man to man but a relation of man to but a relation of state to state ...”; Jean-Jacques Rousseau, *On Social Contract*, Book 1, Ch. 4, in Rousseau’s *Political Writings* 84, bk. 1, Ch. 4, p. 90, Alan Ritter & Julia Bondanella (ed.), 1988.

¹⁵⁰⁹ Additional Protocol to the Geneva Conventions of 1977 (AP I), Article 43(2); see Dinstein, ‘The Conduct of Hostilities under the Law of International Armed conflict’, *op. cit.*, p. 27

¹⁵¹⁰ In its Advisory Opinion of 1996 on Legality of the Threat or Use of Nuclear Weapons, the international Court of Justice recognizes the principle of distinction between combatants and non-combatants as a fundamental and “intransgressible” principle of customary international law; *Advisory Opinion on Legality of the Threat or Use of Force*, [1996] ICJ Rep. 26, 257.

objectives. The entire system established in The Hague in 1899 and 1907 (1) and in Geneva from 1864 to 1977 (2) is founded on this rule of customary law.¹⁵¹¹

The first International Law of War document to deal with the combatant status was Article 155 of the Lieber Code of 1869 which simply states ‘all enemies in regular war are divided into two general classes – that is to say, into combatants and non-combatants, or unarmed citizens of the hostile government ...’¹⁵¹²

The Declaration of the Brussels Conference of 1874, for the first time dealt with the definition of combatant in an international arena.¹⁵¹³ Difference of opinion arose on this issue between the patriotic school which believed the status should also include irregular forces as well as the so-called *francs-tireurs*¹⁵¹⁴ and the military school, believing in limiting the combatant status solely to regular armed forces with severe penalty for non-combatants who take part in the conflict.¹⁵¹⁵ The Hague Regulations of 1907¹⁵¹⁶ were the first notable

¹⁵¹¹ Protocol I Commentary, 598, 1863.

¹⁵¹² Instructions for the Government of the Armies of the United States in the Field, General Order 100, War Department, Adjutant General’s Office (Washington, April 24, 1863), Paras. 152, 153, 154; See, e.g., Davis, G. B., ‘Doctor Francis Lieber’s Instructions for the Government of Armies in the Field’, 1 *AJIL* 13 January and April 1907; Meron, T., ‘Francis Lieber’s Code and Principles of Humanity’, 36 *Columbia Journal Transatlantic Law* 269 1998; Paust, J. J., ‘Dr Francis Lieber and the Lieber Code’, 95 *ASIL Proceedings* 112 2001; Shepard, W. S., ‘One Hundredth Anniversary of the Lieber Code’, 21 *Military Law Review* 157 1963.

¹⁵¹³ From the beginning of the Brussels Conference, it was recognised that in times of war the population of a state is divided into three separate categories: firstly, the regular army; secondly, irregular military units such as militias (irregular forces) which at the time of invasion by the enemy had no time to organise themselves into a regular force; and lastly the civilian population. The most controversial topic of discussion was whether the status combatants should extend to irregular units and members of civil population who had taken part in military activities. This also extended to the right of civilian population to self-defence in occupied territories which attracted particular scrutiny. The definition of Combatants provided by Article 9 of the Brussels Declaration states:

“The laws, rights, and duties of war apply not only to armies; but also to militias and volunteer corps fulfilling the following conditions: (1) that they be commanded by persons responsible for their subordinates; (2) that they have a fixed distinctive emblem recognizable at a distance; (3) that they carry arms openly; and (4) that they conduct their operations in accordance with the laws and customs of war”.

Significantly, it goes on to say that “in countries where militia constitutes the army, or form part of it, they are included under the denomination army”.

Clearly the abovementioned article is intended to extend the laws of war not only to regular army but also other irregular forces as long as they meet the four conditions mentioned above.

¹⁵¹⁴ Article 10 of the Brussels Declaration deals with the specific situation in which the civilian population can take up arms against the invading force, it says:

“The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war”.

¹⁵¹⁵ Drapper, ‘The Status of Combatants and the Question of Guerrilla Warfare, *op cit.*, p. 173; For General information about the concept of the Militia system see: Whisker, J. B., ‘The Militia’, Edwin Mellen Press, 1st ed., July 1992

¹⁵¹⁶ Although the Peace conferences of 1899 and 1907 were almost entirely concerned with international armed conflicts but the final regulations drew tangible influence from the Lieber Code, which ironically came about as a result of the American Civil War; for a comprehensive study of the two Hague Conferences See A. Eyffinger, ‘The 1899 Hague Peace Conference: the Parliament of Men’, Springer, 1st ed., 1999; G.A. Aldrich & C.M. Chinkin (ed.), ‘Symposium: the Hague Peace Conferences’ 94 *AJIL* (2000), pp. 1-98; also G. Best, ‘Peace

instruments to come up with an internationally accepted definition of combatant.¹⁵¹⁷ Article 1 specifies that '[t]he laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps' fulfilling the four conditions of being commanded by a person responsible for his subordinates; having a fixed distinctive emblem recognizable at a distance; carrying arms openly; and conducting their operation in accordance with the laws and customs of war.¹⁵¹⁸ Article 2, extends the belligerent status to the *levee en masse*¹⁵¹⁹, that is to say in situations where the citizens of a country which is being invaded by a foreign power spontaneously take up arms to stem the tide of the invading army, without having had the time to recognize themselves according to Article 1, providing they carry their arms openly and respect the laws and customs of war.¹⁵²⁰ The phrase "combatant" only features in Article 3, which states that: 'The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.'¹⁵²¹

It is worth noting that Article 1 and 2 of the Regulations very much reflected the state of customary international law, from which basis the contemporary international regulations of combatant status subsequently developed.¹⁵²² The above protection is not extended to the civilian population of occupied territories who subsequent to occupation of their territory take up arms against the occupying force.¹⁵²³ Further, according to the opinion of the majority of

Conferences and a Century of Total War: the 1899 Hague Conference and What came Next', 75 *International Affairs* (1999) No. , pp. 619-634.

¹⁵¹⁷ Both 1907 and 1899 Hague Conventions reflected the attitude of the international community towards war which at the time was considered an instrument of national policy and the exclusive province of, and a state of affairs between states. Indeed, this approach was firmly engrained in the notion that war was a political reality and routine means of achieving state policy which could not be eradicated but needed to be regulated.¹⁵¹⁷ Hence, the coercive use of force was the preserve of sovereign states which held an exclusive monopoly over its military and its use of force; Kelson, H. & Trevino, A.J., 'General theory of Law and State', Transaction Publishers, 2005, p. 21; see also Von Clausewitz, C., 'On War', Penguin Classics, 3rd ed., 1982.

¹⁵¹⁸ This Article was the almost exact copy of Article 9 of the Declaration of Brussels Conference of 1874; Schindler and Toman, *op. cit.*, p. 75.

¹⁵¹⁹ *Levee en Masse* is a distinct type of resistance, the collective uprisings, revolt, and insurrection against occupying force. Although, the scope of the concept was later truncated by diplomats but its practice by civilian populations was less controllable; G.D. Solis, 'The Law of Armed Conflict: International Humanitarian Law in War', Cambridge U.P., 1st ed., 2010, p.200; Greenspan, 'the Modern Law of Land Warfare', *op. cit.*, p. 62-64; for an historic appraisal of *Levee* see: Rousseau, C., '*Le Droit des Conflicts Armes*', Paris, 1983; S. Lytle, 'Robespierre, Danton, and the *Levee En Masse*', *The Journal of Modern History*, vol. 29-30, 1957, pp. 325-337.

¹⁵²⁰ Inclusion of the first condition in the 1907 Regulations that *levee en masses* had to carry their arms openly was the only alteration to the 1899 Regulations. The 1899 test of combatancy survived largely unaltered until 1977.

¹⁵²¹ Schindler and Toman, *op. cit.*, p. 76.

¹⁵²² With regard to the Hague Regulations of 1899 & 1907, both the Nuremburg International Military Tribunal in 1946, and the International Military Tribunal of the Far East in 1948, regarded them as declaratory of the law and customs of war recognised by all civilized nations; see e.g. 'Judicial Decisions: International Military Tribunal (Nuremberg)', reprinted in *AJIL* vol. 41, 1947, pp. 248-9.

¹⁵²³ Nevertheless it is ironic to note that in the course of the World War II such forces were recognized by anti-Axis Allies as legitimate forces entitled to protection as combatants; Green, 'The Contemporary Law of Armed

scholars and military practitioners of the said period only conflicts between states brought *jus in bello* into operation.¹⁵²⁴ Thus the issue of internal armed conflict regardless of their intensity remained the concern of sovereign states and rebels were spared no protection and subjected to the domestic legal system of that state, except as noted above by the virtue of recognition of belligerency.¹⁵²⁵ As will be discussed below, not all individuals captured in the course of an armed conflict are entitled to combatant status and its resultant legal protection.

According to the IHL, members of the regular armed forces are provided with combatant status and enjoy immunity from prosecution for acts of war, such as attacks against military objectives.¹⁵²⁶ Further, some members of irregular armed forces are also granted combatant status as long as they meet certain requirements.¹⁵²⁷ As will be seen below the question of combatant status in non-international armed conflict is a lot more controversial.

In an armed conflict regardless of its distinction, no one is without some status and accompanying level of protection.¹⁵²⁸ The ICRC Study argues that regardless of characterization of the conflict there is striking uniformity in the application of IHL witnessed by state practice but in relation to combatant and prisoner-of-war (POW) the status remains solely preserved to international armed conflicts. In particular:

1. All members of the armed forces of a party to the conflict are combatants except medical and religious personnel.
2. The armed forces of a party to the conflict consist of all organized armed forces, groups, and units which are under a command responsible to the party for the conduct of its subordinates.¹⁵²⁹

It is quite obvious that members of NSAGs that fail to distinguish themselves from the civilian population fall outside the universal rules since they are not permitted as lawful

Conflict', *op. cit.*, p. 130. For a General survey see I.P. Trainin, 'Question of Guerrilla Warfare in the Law of War' 40 *AJIL* 534 1946.

¹⁵²⁴ Quincy Wright, 'Changes in the Conception of War', 18 *AJIL* 755 1924, p.755

¹⁵²⁵ L. Moir, 'The Historical Development of Humanitarian Law in Non-International Armed Conflicts prior to 1949', 47 *ICLQ* (1998) p. 337 at pp. 338-350.

¹⁵²⁶ F. Bouchet-Saulnier, *et al.*, 'the Practical Guide to Humanitarian Law', Laura Brau (trans. & ed.), Rowman & Littlefield, 2002, p. 50.

¹⁵²⁷ The doctrine of distinction has not been without its critics, Wheaton states:

'If the separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of international law, all that need to be said is that the progress of events has nullified the triumph, and that, probably, it is just as well to abolish a distinction, in itself illusory and immoral. The idea of war as affecting only certain elements of the population is probably an incentive to war.' H.B. Wheaton, 'International Law', London, 1944 (7th English ed., by A.B. Keith), p. 171.

¹⁵²⁸ Solis, 'The Law of Armed Conflict', *op. cit.*, p. 187; Pictet, Commentary, IV Geneva Conventions (Geneva: ICRC, 1958), at 51.

¹⁵²⁹ See Henckaerts, ICRC study, vol. I: Rules, *op. cit.*, at 11-17.

combatants in a non-international armed conflict and denied POW.¹⁵³⁰ In regards to NSAGs, the issue of legal status of combatants is one of the key elements to classification of conflicts into international and non-international armed conflicts since it decides which rules apply to the said conflict.¹⁵³¹

4.4.2 Combatants in non-international law

The definitions of combatant only appear in IHL rules and there are no provisions concerning combatant status in Common Article 3 Additional Protocol II. Kleffner makes the point that ‘combatant status and its aforementioned consequences is one of the areas, in which customary international humanitarian law has not evolved beyond the dichotomy of international and non-international armed conflict.’¹⁵³² Naturally, states are reluctant to allocate members of NSAGs fighting on their territory combatant status and as a result give them POW status.¹⁵³³ It has been suggested that the reluctance of states is born out of the fear that ultimately the right to prosecute such individuals would be taken away from them.¹⁵³⁴ It is an on-going debate over the question of how members of NSAGs should be categorized as perhaps something analogous to combatant (without immunity from prosecution) or alternatively as civilians who lose protection as a result of taking up arms against the state.¹⁵³⁵ It is worth noting at this stage that in an international armed conflict the only condition in which members of NSAGs could have combatant status is under Article 1(4) of Protocol I exercising their right to self-determination.¹⁵³⁶ As noted above, the four conditions in Article 4A(2) only relate to other militias and volunteer corps, in that they need to have a command structure, have a fixed distinctive sign, carry their arms openly, and carry out their operations according to the laws of war.¹⁵³⁷ Another situation (admittedly very rare) is for the members of a NSAG to take up arms spontaneously and form a *levee en masse* against an invading

¹⁵³⁰ D. Schindler, ‘International Humanitarian Law: Its Remarkable Development and Persistent Violations’, (2003) 5 *Journal of the History of International Law* 165-173.

¹⁵³¹ Sassoli & Bouvier, ‘How Does Law Protect in War?’, *op. cit.*, p. 143-4.

¹⁵³² Kleffner, ‘From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities’, *op. cit.*, P. 321.

¹⁵³³ Cassese, ‘the Status of Rebels under the Protocol on Non-International Armed Conflict’, *op. cit.*, p. 421-2.

¹⁵³⁴ A. Rosas, ‘The Legal Status of Prisoners’ of War: a Study in International Humanitarian Law Applicable in Armed Conflict’, (the Finish Academy of Science and Letters, Helsinki), 1976, pp. 196-202.

¹⁵³⁵ Crawford, ‘the Treatment of Combatants and Insurgents under the Law of Armed Conflict’, *op. cit.*, pp. 153-4.

¹⁵³⁶ Pejic notes that ‘as is well known the inclusion of such conflicts in the Protocol I is one reason why some countries have not ratified the treaty. J. Pejic, ‘”Unlawful/Enemy Combatants”: the Interpretation and Consequences’, in Schmitt & Pejic (eds.) ‘International Law and Armed Conflict: Exploring the Faultlines’, *op. cit.*, p. 345.

¹⁵³⁷ See Hague Regulations of 1907, Article 1; Geneva Convention III, Article 4(A) (2).

enemy. In recent times the only NSAGs that could remotely be considered to have achieved combatant status are the Al-Qaeda members fighting alongside the forces of Taliban the *de facto* government of Afghanistan and members of Hezbollah, the Southern Lebanese militia embroiled in an armed conflict against Israel in 2006. In regards to Hezbollah the most pivotal question was whether the said conflict was an international or non-international armed conflict.¹⁵³⁸ In fact captured Hezbollah fighters argued unsuccessfully before the Israeli Supreme Court that the conflict was an international one and they should be granted POW status by virtue of Article 4(1) of Geneva Convention III.¹⁵³⁹ The Israeli Supreme Court held that due to the fact that Hezbollah is an independent terrorist organization it was not under the authority of the Lebanese government, hence, rejecting their claim to POW status.¹⁵⁴⁰ Moreover, Hezbollah fighters did not satisfy the conditions of Article 4A (2) Geneva Convention III, since they mostly mingled among the civilian population, did not carry their arms openly and did not conduct their operation according to laws of war.¹⁵⁴¹

The case of Al-Qaeda members in the war in Afghanistan in 2001 is a lot more challenging and complicated. In October 2001, the United States assisted by other states as part of its policy of “Global War on Terrorism” launched a military operation against its *de facto* Taliban government and its Al-Qaeda allies made up mostly of foreign fighters in Afghanistan. Initially, the United States administration did not grant POW status to Taliban fighters.¹⁵⁴² However, based upon the fact that Taliban forces controlled most of Afghanistan (apart from a relatively small territory under Northern Alliance control) the Bush administration decided to grant them POW status.¹⁵⁴³ For the purpose of this study it is useful to consider their legal status as a NSAG embroiled in that conflict. Although it could be

¹⁵³⁸ If the conflict was considered an international one, the doctrines of necessity and proportionality applicable as well as engaging the Articles on State Responsibility to it. Generally see, A. Zimmermann, ‘The Second Lebanon War: *Jus ad Bellum*, *jus in bello* and the Issue of Proportionality’, *Max Planck Yearbook of United Nations Law*, vol. 11, 2007, p. 99-141.

¹⁵³⁹ Although in this regard a counter-argument could be made that by virtue of the fact that Hezbollah at the time had three serving minister in the cabinet they could be considered an extension of the Lebanese government. In fact, Kirchner has argued that Hezbollah’s attacks against Israel are attributable not only to Lebanon but also to Iran and Syria – see S. Kirchner, ‘Third-party Liability for Hezbollah Attacks against Israel’, *German Law Journal*, Vol. 7(9) (2006), pp. 777-84.

¹⁵⁴⁰ *Srur et al v, The State of Israel* (Judgment) Crim Appeal 8780/06, 8984/06 (20 November 2006) (Israel Supreme Court sitting as a Court of Criminal Appeals) para. 12.

¹⁵⁴¹ *Ibid*, paras. 6&12.

¹⁵⁴² See the statement from the White House Press Secretary Ari Fleischer on 07 February 2002, in which he stated: ‘The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the Al Qaeda.’ Available at <http://www.state.gov/s/1/38727.htm>

¹⁵⁴³ C. Greenwood, ‘International Law and the ‘War against Terrorism’, 78 *International Affairs*, 301 (2002), p. 314.

argued that Al-Qaeda were part of other militias and voluntary corps attached to the Taliban government,¹⁵⁴⁴ their resort to terrorist tactic allied to lack of a fixed distinctive sign, probably meant that they could not be considered as lawful combatants.¹⁵⁴⁵ According to a report by the International Bar Association's Task Force on International Terrorism:

It must be acknowledged that determining the status of combatants is not necessarily an easy or clear-cut exercise. However, as reference should be made to the facts in each individual case, a blank refusal to grant POW status can never be accepted conduct. Failure to apply the Geneva Conventions by one state party could undermine the principle of reciprocity and even the humanitarian regime itself.¹⁵⁴⁶ Therefore, it appears from the above examples that it is very unlikely that members of a NSAG would be granted combatant status as defined under IHL rules, since this status would be granted to them if it is established that they operate within a state structure which under the circumstances they cannot fulfil.¹⁵⁴⁷

In the last decade the discussion regarding the legal situation of unlawful/unprivileged combatant has preoccupied the international community. The term "combatant" and its derivatives such as "unlawful combatant", "enemy combatant" and "unprivileged belligerents" are only used in reference to international armed conflict, "combatant status" and derived privileges does not exist in internal armed conflict and its usage in that context is rather colloquial.¹⁵⁴⁸ Furthermore, there is no reference to the term "unlawful combatant" in

¹⁵⁴⁴ In a press release on 8 February 2002, the International Committee of Red Cross (ICRC) acknowledged that there were 'divergent views between the United States and the ICRC on procedures which apply to how to determine that the persons detained are not entitled to prisoner of war status.' ICRC Press release, 9 February 2002 available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/26D99836026EA80DC1256B6600610C90>. See also the statement issued by the UN High Commissioner for Human Rights issued a statement in which she reminded the detaining powers of their obligation to treat prisoners humanely and expressed the view that where the status of the detainees is disputed a competent tribunal should make the determination. Available at: <http://www.unog.ch/news/documents/newsen/hr02004e.htm>. The Inter-American Commission on Human Rights also ordered the United States to 'take urgent measures necessary to have the legal status of the detainees in Guantanamo Bay determined by a competent tribunal.' See Annual Report 2002, Inter-American Commission on Human Rights, '*Detainees at Guantanamo Bay, Cuba; Decision on Precautionary Measures*', 12 March 2002.

¹⁵⁴⁵ Bianchi argues that, 'this initial assessment would be hard to accept, given that the evidence would seem to show that Al-Qaeda operated quite separately and certainly not in a subordinate way to the Taliban. Rather, it would appear that the Taliban were supportive of Al-Qaeda, while remaining distinct from it as the *de facto* governing entity in Afghanistan in 2001.' A. Bianchi & Y. Naqvi, 'International Humanitarian Law and Terrorism', Oxford & Portland, 2011, p. 286.

¹⁵⁴⁶ R. Goldstone et al., 'International Terrorism: Legal Challenges and Responses', a Report by the International Bar Association's Task Force on International Terrorism, Transnational Publishers, 2003, p. 97.

¹⁵⁴⁷ N. Lubell, 'Extraterritorial Use of Force against Non-State Actors', Oxford U.P., 2011, p. 139.

¹⁵⁴⁸ See K.W. Watkin, 'Warriors without Right? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy', Program on Humanitarian Policy and Conflict research, Harvard University, Occasional Paper series, Winter 2005, <http://www.hpcr.org/pdf/occasionalpaper2.pdf>; J. Pejic, "'Unlawful/Enemy Combatants':

any instruments of the IHL, customary or conventional.¹⁵⁴⁹ It has also been suggested in recent years that such individuals have no protection under IHL, because they are neither combatants nor civilians. Additionally, it is true that conditions of modern warfare may blur in practice; the dichotomy of combatant vis-à-vis non-combatant. However, it has been argued that in the modern warfare this is not as clear cut as in the past.¹⁵⁵⁰ While some scholars such as Green have suggested that the use of the term ‘unlawful combatants’ is incorrect, such individuals are non-combatants unlawfully taking part in combat.¹⁵⁵¹ This is mainly due to the fact that the customary international humanitarian law has not developed beyond the traditional dichotomy of international and non-international armed conflict, notwithstanding the imprecise use of the term “combatant” in some literature covering both types of armed conflict.¹⁵⁵²

4.4.3 Civilians

Civilians are the main victims of non-international armed conflicts involving NSAGs. The status of civilians, is negatively defined in Article 50 of Additional Protocol I, in other words anything that does not meet the definition of military is civilian. Article 50 of Additional Protocol I, provides that a civilian is any person who does not belong to any category of persons referred to in Article 4A(1), (2), (3), and (6) of the Third Geneva Convention and in Article 43 of the Protocol I. The civilian population comprises all persons who are civilians.¹⁵⁵³ The presence within civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.¹⁵⁵⁴ However, due to lack of definition of combatant in non-international armed conflict the issue becomes considerably more complicated.¹⁵⁵⁵ Lubell opines that ‘being in the legal category of civilians does not by any means leave a non-state actor who takes part in the fighting

Interpretation and Consequences”, in ‘International Law and Armed Conflict: Exploring the Faultlines’, M. Schmitt & J. Pejic, (ed.), Martinus Nijhoff Publishers, 1st ed., 2007, 335-355, p. 335.

¹⁵⁴⁹ See K. Dormann, “The Legal Situation of ‘Unlawful/Unprivileged Combatants’”, *IRRC* March 2003 Vol. 85 No. 845, pp. 45-74, p. 46.

¹⁵⁵⁰ P.H. Kooijmans, ‘In the Shadow-land Between Civil War and Civil Strife: Some reflections on the Standard-Setting Process’, in ‘Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in honour of Frits Kalshoven’, in Kalshoven & Delissen, et al. (ed.), Martinus Nijhoff Publishers, 1991, pp. 225-248.

¹⁵⁵¹ Green, ‘The Contemporary Law of Armed Conflict’, *op. cit.*, 127.

¹⁵⁵² Kleffner, “From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities”, *op. cit.*, p. 320-21.

¹⁵⁵³ Additional Protocol I, Art 50(2).

¹⁵⁵⁴ Additional Protocol I, Art 50(3).

¹⁵⁵⁵ See Henckaerts, International Committee of Red Cross study, vol. I: Rules, *op. cit.*, p. 17.

immune from attack.’¹⁵⁵⁶ The biggest challenge facing international community is protection of civilians in especially situations where there is a blurring of the distinctions between armed conflict, organized crime and large scale violations of human rights, and ultimately between war and peace.¹⁵⁵⁷ The ICRC recommendation on the issue of direct participation in hostilities refers to civilians in non-international armed conflict as: ‘... all persons who are not members of state armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.’¹⁵⁵⁸

4.4.3 Direct participation in hostilities

Direct participation in hostilities is a concept that applies only to civilians. The hostilities may be either international or non-international.¹⁵⁵⁹ The precise scope of the notion of ‘direct participation’ is in controversy.¹⁵⁶⁰ The most comprehensive judicial examination on a national level has been provided by the Israeli Supreme Court in 2006 in the *Target Killing* case, concerning the assassination of members of Palestinian NSAGs in Gaza Strip and West Bank.¹⁵⁶¹ As far as instruments of IHL are concerned, the notion of direct participation denotes carrying out an attack or action in the course of an armed conflict. In regard to direct participation, the Commentary to Protocol I, provides some clarification: ‘acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.’¹⁵⁶² In its view, direct participation ‘implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place the activity takes place.’¹⁵⁶³ It is interesting to note that the focus of the Commentary is ‘acts of war’ directed against ‘enemy forces’ and not civilians *per se*.¹⁵⁶⁴

¹⁵⁵⁶ Lubell, ‘Extraterritorial Use of Force against Non-State Actors’, *op. cit.*, p. 140.

¹⁵⁵⁷ L. Reydam, ‘*A la guerre comme a la guerre*: patterns of armed conflict, humanitarian law and new challenges’, *IRRC*, Vol. 88, No. 864 December 2006, p. 732; see also M. Kaldor, ‘New and Old Wars: Organized Violence in a Global Era’, Polity Press, 1999.

¹⁵⁵⁸ Interpretive Guidance on the Notion of Direct Hostilities under International Humanitarian law, International Committee of Red Cross, 2009, (hereinafter ICRC Interpretive Guidance), p. 16.

¹⁵⁵⁹ Solis, ‘The Law of Armed Conflict’, *op. cit.*, P. 202.

¹⁵⁶⁰ Bianchi & Naqvi, ‘International Humanitarian Law and Terrorism’, *op. cit.*, p. 179.

¹⁵⁶¹ By and large, the academic assessment has been supportive of the judgement. E.g. see A. Cassese, ‘On Some Merits of the Israeli Judgement on Targeted Killings’, *JICJ*, 339; M. Milanovic, ‘Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli *Target Killing Case*’ (2007) 866 *IRRC* 373; O. Ben-Naftali, ‘A Judgement in the Shadow of International Criminal Law’ (2007) 5 *JICJ* 322; R.S. Schondorf, ‘The Target Killing Judgement’, (2007) *JICJ* 301.

¹⁵⁶² Commentary Protocol I, *op. cit.*, para. 1679, at 516.

¹⁵⁶³ Ibid.

¹⁵⁶⁴ Bianchi & Naqvi, ‘International Humanitarian Law and Terrorism’, *op. cit.*, p. 180.

Some academics have supported this approach. For example, Dinstein notes that ‘in essence, taking an active part in hostilities (which negates the status of civilians) implies participation in military operations.’¹⁵⁶⁵ Equally, Kalshoven stated that ‘to “take a direct part in hostilities” must be interpreted to mean that the person in question performs hostile acts, which, by their nature or purpose, are designed to strike enemy combatants or *matériel*; acts in other words, such as firing at enemy soldiers, throwing a Molotov-cocktail at an enemy tank, blowing up a bridge carrying war *matériel*, and so on.’¹⁵⁶⁶ This analysis may give the impression that attacking civilian targets may not constitute direct participation in hostilities. However, there are those who argue that due to the asymmetrical nature of armed conflict and NSAGs faced with much superior state armies may conclude that the civilian population is a ‘center of gravity, ... [and] deliberately attack it.’¹⁵⁶⁷ According to Rogers such acts would tantamount to direct participation in hostilities.¹⁵⁶⁸ The Israel Supreme Court in the *Target Killing* case, agreed with the view that ‘hostilities’ are acts which by nature are intended to inflict damage primarily to military personnel and targets but considering the contemporary nature of armed conflict targeting civilians should also be added to the definition.¹⁵⁶⁹ As a reflection of this approach Melzer points out that being a member of an ‘irregularly constituted armed group who assumes a continuous fighting function on behalf of a party to the conflict, that is to say, a function which involves direct participation in hostilities on a regular basis’ do not qualify as civilians.¹⁵⁷⁰ This view has recently been expressed by a group of experts that ‘there seemed to be general agreement among the experts that direct participation in hostilities did not necessarily require the use of armed force and did not necessarily have to cause death, injury and destruction.’¹⁵⁷¹ The issue of “direct part in hostilities” has been subject of expert analysis by the ICRC and the TMC Asser Institute in The Hague, with the intention of clarifying the notion as well as providing practical analysis.¹⁵⁷² This process culminated in

¹⁵⁶⁵ Y. Dinstein, ‘The Conduct of Hostilities under Law of International Armed Conflict’, Cambridge U.P., 2004, p. 152.

¹⁵⁶⁶ Kalshoven & Zegveld, ‘Constraints on the Waging of War’, *op. cit.*, p. 99.

¹⁵⁶⁷ M.N. Schmitt, ‘the Impact of High and Low-Tech Warfare on Principle of distinction’ in R. Arnold & P-A Hildbrand (eds), *International Humanitarian Law and the 21st Century’s Conflicts: Changes and Challenges* (Lausanne, Edis, 2005), p. 176.

¹⁵⁶⁸ A.P.V. Rogers, ‘Unequal Combat and the Law of War’, *YIHL*, Vol. 7, 2004, pp. 3-34, p. 5.

¹⁵⁶⁹ ‘*The Target Killing Case*’, HCJ 769/02, 13 December 2006, para. 33.

¹⁵⁷⁰ N. Melzer, ‘Target Killing in International Law’, Oxford U.P., 2008, pp. 321 & 337.

¹⁵⁷¹ *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, Summary Report, Geneva, International Committee of Red cross and the Asser Institute, 2005, Geneva, p. 14.

¹⁵⁷² *Fourth Expert Meeting on the Notion of Direct Participation in Hostilities*, Geneva, Summary Report, International Committee of Red cross and the Asser Institute, 27-8 November 2006, Geneva.; *Fifth Expert Meeting on the Notion of Direct Participation in Hostilities*, Geneva, Summary Report, International Committee of Red cross and the Asser Institute, 5-6 February 2008, Geneva.

the ICRC recently releasing its interpretation of the constitutive elements of direct participation in hostilities as follows:

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); and
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).¹⁵⁷³

In the same vein, the ‘Interpretive Guidance’ Report of the ICRC adopts the same approach stating that ‘in non-international armed conflict, organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).’¹⁵⁷⁴ The concept of “continuous combat function” is not a term found in treaty law.¹⁵⁷⁵ Further, because of the military advantage in states’ favor most members of NSAGs constantly switch from being a civilian working among the civilian population during the day with complete immunity to actively taking part in hostile act under the cloak of darkness in the evening.¹⁵⁷⁶ According to the rule the immunity is revoked as long as and for such time as the individual is taking a direct part.¹⁵⁷⁷

It has been noted that ‘... interpretation of the notion of “direct part in hostilities” may be subject to varying viewpoints, which have a dramatic effect upon the conclusion with regard to the legality of a particular target.’¹⁵⁷⁸ For example, the US Navy manual adopts a cautious approach by stating: ‘Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make a honest determination as to whether a particular

¹⁵⁷³ ICRC Interpretive Guidance, *op. cit.*, p. 46.

¹⁵⁷⁴ Interpretive Guidance on the Notion of Direct Hostilities under International Humanitarian law, International Committee of Red Cross, 2009, (hereinafter ICRC Interpretive Guidance), p. 16.

¹⁵⁷⁵ K. Watkin, ‘Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance’, 42 *New York University Journal of International Law & Policy* 641 (2010), p. 655.

¹⁵⁷⁶ W.C. Banks, ‘New Battlefields/Old Laws: Critical Debates on Asymmetrical Warfare’, Columbia U.P., 2011, p. 92.

¹⁵⁷⁷ Lubell, ‘Extraterritorial Use of Force against Non-State Actors’, *op. cit.*, p. 142.

¹⁵⁷⁸ Bianchi & Naqvi, ‘International Humanitarian Law and Terrorism’, *op. cit.*, p. 181.

civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information available at the time.'¹⁵⁷⁹

Nowadays, it is a factual reality that because of the asymmetrical nature of the conflicts NSAGs' operations may include collaborators who provide support but do not carry out attacks.¹⁵⁸⁰ In such a climate, where it is difficult to distinguish between civilians and combatants, some scholars advocate a more liberal interpretation of this distinction which in their opinion would go some way to guarantee a more comprehensive civilian protection.¹⁵⁸¹ In this regard Schmitt proposes a test based on:

The criticality of the act to the direct application of the enemy ... an individual performing an indispensable function in making possible the application of force against the enemy is directly participating. In other words, the appropriate test is whether that individual is an integral facet of the uninterrupted process of defeating the enemy.¹⁵⁸²

In fact, according to Article 51(3) of Additional Protocol I, which is considered as customary law,¹⁵⁸³ civilians are entitled to protection 'unless and for such time as they take direct part in hostilities.' The same rule also exists in non-international armed conflict,¹⁵⁸⁴ which makes it very pertinent in contemporary warfare where sometimes it is difficult to distinguish between civilians and combatants.¹⁵⁸⁵ However, there is no agreed definition with regard to the scope of the phrase 'for such time' in the above-mentioned article.¹⁵⁸⁶ It is worth noting that the link between direct participation and duration of hostilities in regards to members of NSAGs is of particular importance. Determining whether or not a civilian is taking a direct part in hostilities does not solve the issue, since the most crucial issue is the need to define the time

¹⁵⁷⁹ United States Navy/Marine Corps/Coast Guard, The Commander's Handbook on the Law of Naval Operations (1995) NWP 1-14M, MCWP P5800.7, para. 11.3, www.cpf.navy.mil/pages/legal/NWP%201-14/NWPCH11.htm.

¹⁵⁸⁰ See S. Cayci, 'Terrorist Warfare and the Law of Armed Conflict: a Guide for the Theatre Commander', in W.P. Heere (ed), *op. cit.*, 93-100, p. 95.

¹⁵⁸¹ Bianchi & Naqvi, 'International Humanitarian Law and Terrorism', *op. cit.*, p. 181.

¹⁵⁸² Schmitt advocates that 'gray areas should be interpreted liberally, i.e., in favor of finding direct participation'; M.N. Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict' in H. Fischer (ed), *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (Berlin, BWV, 2004), pp. 501, 505.

¹⁵⁸³ See Henckaerts, ICRC study, vol. I: Rules, *op. cit.*, pp. 19-24; see also *the Public Committee against Torture in Israel and ors v. Israel and ors ('The Target Killing Case')*, HCJ 769/02, 13 December 2006, para. 30.

¹⁵⁸⁴ In relation to non-international armed conflict see Art 13 Additional protocol II.

¹⁵⁸⁵ H. Fischer, 'the Status of Unlawful Combatants' in W.P. Heere (ed), *Terrorism and the Military: International Legal Implications* (Asser: The Hague, 2003) 101-106, p. 102.

¹⁵⁸⁶ *Public Committee against Torture v. Israel* HCJ 769/02 (December 2006) Paras. 34-37.

during which those who take direct part in hostilities lose their civilian protection.¹⁵⁸⁷ The Israel High Court of Justice dealt with the issue as follows:

... It is helpful to examine the extreme cases. On the one hand, a civilian taking direct part in hostilities one single time, sporadically, who later detaches himself from that activity, is a civilian who, starting from the time detaches himself from the activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his “home”, and in the framework of his role in the organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack ‘for such time’ as he is committing the chain of acts.¹⁵⁸⁸

It is noticeable that the Israel High Court of Justice is of the opinion that each case must be decided on its own merit and did not offer a one-size-fits-all approach.¹⁵⁸⁹ In spite of the fact that there is no consensus on this issue this view is very much reflected by scholarly writings as well as in state practice that once a civilian participates in hostilities she/he should lose her/his immunity not only in the course of the attack but for such time as the hostilities continue.¹⁵⁹⁰ As McDonald says, ‘a sleeping committed terrorist or rebel who is committed to armed struggle against an opponent poses just as potentially lethal a military threat as the sleeping combatant.’¹⁵⁹¹ It has also been noted by that ‘once an individual has opted into the hostilities, he or she remains a valid military objective until unambiguously opting out. This may occur through extended non-participation or an affirmative act of withdrawal.’¹⁵⁹²

The ICRC Interpretive Guidance has adopted a more rational approach that the loss of immunity of a civilian is only limited to the duration of the time they are partaking in hostilities and they would regain immunity upon termination of direct participation.

¹⁵⁸⁷ Lubell, ‘Extraterritorial Use of Force against Non-State Actors’, *op. cit.*, p. 142; see also Third Expert Meeting on the Notion of Direct Participation in Hostilities, *op. cit.*, pp. 59-68.

¹⁵⁸⁸ *Targeted Killings*, *op. cit.*, para. 39.

¹⁵⁸⁹ *Targeted Killings*, *op. cit.*, paras. 40&60; Lubell, ‘Extraterritorial Use of Force against Non-State Actors’, *op. cit.*, p. 143.

¹⁵⁹⁰ See International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ Report Prepared by the International Committee of Red Cross, Geneva, 2003, p. 32; Fischer, ‘the Status of Unlawful Combatants’, *op. cit.*, p. 103;

¹⁵⁹¹ A. McDonald, ‘The Challenges to International Humanitarian Law and the Principle of Distinction and Protection from the Increased Participation of Civilians in Hostilities’, Working Paper for a Presentation at the University of Tehran at a Round Table co-hosted by the University of Tehran and Harvard University’s Humanitarian Law Research initiative on Interplay between International Humanitarian Law and International Human Rights Law, P. 21.

¹⁵⁹² Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, *op. cit.*, p. 506.

Additionally, it does distinguish between civilians and members of NSAGs who would lose protection on the basis of ‘continuous combat function’.¹⁵⁹³

4.5 Detention under international law

4.5.1 Prisoners of war status in international law

Both the Geneva Convention III and Protocol I establish clear obligations with regard to the treatment of detainees held by the opposing army. As stated above, the Geneva Conventions of 1949 are the most prominent example of treaties that bind states to a particular manner of conduct with respect to the detainees. The Geneva Conventions like all instruments of IHL are designed to protect those not-or no longer involved in the hostilities.¹⁵⁹⁴ Nonetheless, in an international armed conflict upon capture a lawful combatant is entitled to prisoner of war (POW) status, subject to the *condicio sine qua non*.¹⁵⁹⁵ Entitlement to POW status is set out in the 1949 Geneva Conventions to the treatment of detainees, the Convention Relative to the Treatment of Prisoners of War (hereinafter GC III), and the 1977 Additional Protocol I to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts. Article 4(A) of GC III specifies categories of persons entitled to POW status as well as outlining the protections that High Contracting Parties to the Conventions must provide for those who meet the criteria, as a result, only those persons will be granted protection under this convention. The text of GC III provides that POWs are persons belonging to one of the following categories, who fall into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of the other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militia or volunteer corps, including such organized resistance movements, fulfill the following conditions:
 - (a) That of being commanded by a person responsible for his subordinates;
 - (b) That of having a fixed distinctive sign recognizable at a distance;

¹⁵⁹³ ICRC Interpretive Guidance, *op. cit.*, p. 70-73.

¹⁵⁹⁴ See International Committee of Red Cross Advisory Service on International Humanitarian Law, What is International Humanitarian Law? (2004), [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/\\$File/What_is_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf).

¹⁵⁹⁵ Dinstein, ‘The Conduct of Hostilities under Law of International Armed Conflict’, *op. cit.*, p. 29.

- (c) That of carrying arms openly;
- (d) That of conducting their operation in accordance with the laws and customs of war.

According to Article 5 of GC III, if there is any uncertainty regarding the status of captured belligerents, as long as such individuals upon their capture by the enemy come within any of the categories specified in Article 4, they are to be treated *prima facie* entitled to POW status until such time as their status is formally determined by a competent tribunal (be it civilian or military) and not by an administrative authority. The tribunal usually consists of a panel of military officers from the detaining power which would determine whether the captured combatants are entitled to POW status or not.¹⁵⁹⁶ Even if the said tribunal was to acquit the POW in question the Detaining Power may intern him until the end of hostilities.¹⁵⁹⁷ Nevertheless, a more noteworthy shift took place with the adoption of Articles 43 and 44 of Additional Protocol I (1977).¹⁵⁹⁸ Article 43(2) describes combatants as all the members of the armed forces of a party to an armed conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention). Nevertheless, Article 51(3) of Protocol I, 1977, a non-combatant, that is to say, civilian, who takes a direct part in hostilities loses his/her status as protected civilian under both the Protocol I and the 1949 Civilian Convention, only so long as he/she acts in that manner, and he/she then becomes a legitimate object of attack. As a result an individual cannot be a civilian during the day and a combatant in the evening, simply because he/she is neither a civilian nor a combatant, according to Dinstein, she/he is an “unlawful combatant” and can lawfully be targeted by the enemy but is not entitled to POW status as a combatant.¹⁵⁹⁹ Baxter defines unprivileged belligerents as “persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason that they have engaged in hostile conduct without meeting the qualifications established by article 4 of the Geneva Prisoner of War Conventions.”¹⁶⁰⁰

¹⁵⁹⁶ GC III, article 102; Michael J. Matheson, ‘Remarks’, 2 *American University Journal of International Law & Policy*, 425-26

¹⁵⁹⁷ Pejic, “‘Unlawful/Enemy Combatants’: Interpretation and Consequences”, *op. cit.*, p. 336.

¹⁵⁹⁸ Kleffner, ‘From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities’, *op. cit.*, p. 321.

¹⁵⁹⁹ Dinstein, ‘The Conduct of Hostilities under the Law of International Armed conflict’, *op. cit.*, p.27

¹⁶⁰⁰ Baxter, R.R., and ‘So-called‘ Unprivileged Belligerency’: Spies, Guerrillas and Saboteurs’ (1951) *Br. YB. Int’l L.* 323, p. 328.

4.5.2 Prisoners of war status in non-international armed conflict

In conventional armed conflicts, members of any armed forces wear uniforms in order to distinguish themselves from the civilian population.¹⁶⁰¹ But, because of the asymmetrical nature of contemporary conflicts in some cases even members of states' armed forces do not wear uniforms fearful of being recognized by opposing force as in recent years American and British Special Forces have carried out operations out of uniform in Afghanistan and Iraq.¹⁶⁰² The situation regarding combatant status of NSAGs that do not come under the ambit of national liberation movements is a lot more different.¹⁶⁰³ In 1970, Bond observed that, 'the rebel presently fights in a twilight zone between lawful combatancy and common criminality' still rings true.¹⁶⁰⁴ The prominence of NSAGs allied to their ability to carry out operations trans-nationally sometimes matching the might of some of the state armed forces has been one of the most outstanding features of armed conflict in the first decade of the Twenty-First Century.¹⁶⁰⁵ This also poses a direct challenge to sovereignty of states in whose territories they operate in. On this point Crawford opines:

'From statist perspective, the denial of combatant status to non-state participants in internal armed conflicts is straight forward. The accepted wisdom is that no state would willingly grant any degree of recognition to a movement that seeks either to overthrow the established authority, attempting to gain control of the government where the leadership of the state is in dispute, or to secede and form a new, breakaway state. States would prefer to treat such rebels as criminals, and not allow them any of the rights and privileges normally attached to combatant status in international law.'¹⁶⁰⁶

Hence, the issue of combatant status in relation to NSAGs has preoccupied international lawyers, politicians and military practitioners.¹⁶⁰⁷ If combatant status is not given to a participant in an armed conflict he no longer is protected by IHL regarding treatment of

¹⁶⁰¹ Rogers, 'Unequal Combat and the Laws of War', *op. cit.*, p. 5.

¹⁶⁰² M.N. Schmitt, 'Asymmetrical Warfare and International Humanitarian Law', 62 *Air Force Law Review* 1 2008, p. 15

¹⁶⁰³ M. Sassoli, & A. Bouvier, 'How Does Law Protect in War?', International Committee of Red Cross, 1999, p. 208; see also K.W. Watkin, 'Combatants, Unprivileged Belligerents and Conflict in the 21 Century', 1 *IDF L.R.* 69 2003.

¹⁶⁰⁴ J.F. Bond, 'Application of the Law of War to Internal Armed Conflicts', (1973) 3 *Georgia Journal of International & Comparative Law* 345, 367.

¹⁶⁰⁵ See e.g. W. Münkler, 'New Wars', Polity, 2004.

¹⁶⁰⁶ Crawford, 'the Treatment of Combatants and Insurgents under the Law of Armed Conflict', *op. cit.*, 73.

¹⁶⁰⁷ See generally E. Kossoy, 'Living with Guerrilla', Librairie Droz, Geneva, 1976; especially pp. 71-146.

POWs.¹⁶⁰⁸ Accordingly, the individuals in question become subject to the domestic criminal law of the state in which they are arrested.¹⁶⁰⁹ The punishments meted out to them may include the death penalty, if their participation has resulted in death to others in the course of the conflict.¹⁶¹⁰ By definition the law applicable in non-international armed conflict does not anticipate a combatant's status for a person who is partaking in such a conflict and she/he would be considered an "unlawful/unprivileged combatant".¹⁶¹¹ Nevertheless, such non-state participants must be treated humanely if arrested in the course of the armed conflict.¹⁶¹² Crawford is of the opinion that non-international armed conflicts provide an additional complication, 'while in international armed conflicts there is some scope for unlawful combatants to be protected under either Convention III or Convention IV, no such scope exists for unlawful combatants in internal armed conflicts. The Geneva Conventions, save for Common Article 3, deal with international armed conflict only. Therefore a non-state participant could never hope to receive protection equivalent to Convention III or Convention IV, even if they followed the rules of IHL stringently. Combatant status and the attendant POW rights are categorically denied to non-state participants in non-international armed conflicts. This goes to the heart of the IHL system, the idea of who may be 'permitted to participate in an armed conflict.'¹⁶¹³ In particular, the civilians that participate actively in the fighting are no longer considered as civilians and may be subjected to military targeting only 'for such time as they take a direct part in hostilities.'¹⁶¹⁴ Yet, as long as they retain the status of civilian they would be granted 'general protection against dangers arising from military operations'.¹⁶¹⁵ Under IHL combatants in international armed conflicts are entitled to engage in acts such as killing of a member of another state's army or destruction of a military

¹⁶⁰⁸ E. Crawford, 'The Treatment of Combatants and Insurgents under the Law of Armed Conflict', Oxford U.P., 2010, 68.

¹⁶⁰⁹ A. Rosas, 'The Legal Status of Prisoners' of War: a Study in International Humanitarian Law Applicable in Armed Conflict', (the Finish Academy of Science and Letters, Helsinki), 1976, p. 305; it is worth noting that according to Art. 85 of GCIII & Art. 44 of API, captives do not lose their POW status due to their pre-capture acts, even if such acts amount to war crimes. See generally Meyer, 'Liability of POWs for Offences Committed Prior to Capture: Astiz Affairs', 32 *ICLQ* 948 (1993).

¹⁶¹⁰ Ipsen, 'Combatants and Non-Combatants', in Fleck (ed.), 'The Handbook of Humanitarian Law in Armed Conflict', *op. cit.*, p. 68-9.

¹⁶¹¹ K. Dörmann, 'the Legal Situation of "Unlawful/Unprivileged Combatants"', *IRRC* March, 2003, vol. 85, No. 849, p. 47.

¹⁶¹² Under Common Art. 3, and Art. 4-7 of Protocol II.

¹⁶¹³ Crawford, 'the Treatment of Combatants and Insurgents', *op. cit.*, p. 68-9.

¹⁶¹⁴ First Additional Protocol to the Geneva Conventions, Article 51(3).

¹⁶¹⁵ Additional Protocol II according to Henckaerts et al., does not explicitly require precautions against the effects, however, it is noted that Article 13(1) requires that "*civilian population and individual civilians shall enjoy general protection against the danger arising from military operations*"; Henckaerts, et al., 'Customary international Humanitarian Law: Rules', *op. cit.*, p. 69.

objective.¹⁶¹⁶ On the other hand, IHL in the context of non-international armed conflict has no specific provisions to deal with “combatant” or POW status.¹⁶¹⁷ Therefore, those who have partaken in an internal armed conflict will not be granted “combatant” status and may be treated as criminals, punished under the purview of domestic criminal law for participating in the hostilities and will not be granted prisoner of war status.¹⁶¹⁸ The main reason for the absence of combatant status in non-international armed conflict is the reluctance of sovereign states to encourage internal uprising by granting their citizens or others the legal right to take on its military forces on behalf of a NSAG, an act which would clearly compromise their sovereignty, territorial integrity as well as their monopoly on the coercive use of force.¹⁶¹⁹ Furthermore, upon violation of international humanitarian norms they could be prosecuted by international criminal tribunals based on their individual liability.¹⁶²⁰

It is also worth noting that in the past a few organizations such as the Irish Republican Army (IRA), the African National Congress (ANC) and the Palestinian Liberation Organization (PLO), have expressed their willingness to comply with IHL, in exchange for the recognition of lawful and combatant and POW status, which were subsequently rejected by the governments of states concerned.¹⁶²¹ In this regard Kleffner opines:

All that the laws of armed conflict do is to encourage (not oblige) ‘the authorities in power’ to grant the widest possible amnesty to persons who participate in the armed conflict, provided such persons have not committed war crimes or other international crimes, which states are obliged to investigate and prosecute.¹⁶²²

Nonetheless, when it comes to the question of amnesty, Article 6(5) of Additional Protocol II sets out judicial guarantees stipulated in the Common Article 3 which provides the following provision; ‘at the end of the hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.’

¹⁶¹⁶ F. Bouchet-Saulnier, *et al.*, ‘The Practical Guide to Humanitarian Law’, Laura Brau (trans. & ed.), Rowman & Littlefield, 2002, p. 50.

¹⁶¹⁷ D. Matas, ‘Armed Opposition Groups’, *Manitoba Law Journal* 24 (1997), p. 67.

¹⁶¹⁸ ‘The Manual of the Law of Armed Conflict’, UK Ministry of Defence, Oxford U.P., 2004, p. 387.

¹⁶¹⁹ Kleffner, ‘From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities’, *op. cit.*, p. 323.

¹⁶²⁰ A. Cassese, ‘The International Criminal Tribunal of the Former Yugoslavia and the Implementation of International Humanitarian Law’, in ‘The United Nations and International Humanitarian Law’, Paris: Pedone, 1996, p. 243.

¹⁶²¹ M.S. Bassiouni, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors’, *the Journal of Criminal Law and Criminology*, Vol. 98, No. 3, 2008, pp. 711-810, p. 749.

¹⁶²² Kleffner, ‘From ‘Belligerents’ to ‘Fighters’ and Civilians Directly Participating in Hostilities’, *op. cit.*, p. 322.

4.6 International human rights law (IHRL) in armed conflict

4.6.1 Relevance of IHRL

Having considered IHL at length in relation to armed conflict and NSAGs, at this stage we should also pay particular attention to International Human Rights Law (IHRL) and its influence upon law of war (IHL) in order to supplement protection for individuals in particular in times of internal armed conflict.¹⁶²³ As mentioned above, under the unequivocal wording of Common Article 3, it is undisputed that IHL binds state armed forces as well as NSAGs involved in non-international armed conflict.¹⁶²⁴ On the other hand human rights obligations are binding upon governments only, and unlike IHL there is no reciprocity between the two parties involved.¹⁶²⁵ In spite of the fact that both IHL and IHRL are primarily addressed to states but the enforcement methods under IHRL are different to those of IHL.¹⁶²⁶ Under IHRL, whilst the human rights safeguards and protections are available to persons essentially against state, under IHL, the obligation to observe Common Article 3 is binding upon all parties to the conflict.¹⁶²⁷

States embroiled in internal armed conflict are also under obligation (both treaty and customary law) to comply with basic international human rights norms.¹⁶²⁸ It is worth noting that these norms apply particularly in situations that fall between a fully-fledged armed conflict and civil disturbance in which the categorization of a conflict is disputed or largely unclear.¹⁶²⁹ The Secretary General of the UN stated, ‘some argue that non-state actors should

¹⁶²³ This is where importance of human rights law comes to the forth particularly in situations of armed conflict confined to the borders of a particular state the most common type of armed conflict since 1945 characterized as civil wars or armed conflicts of non-international in nature. See e.g. Project Ploughshares, Armed Conflict Report 2007 (2007) (providing the Current on-going conflicts), available at: <<http://www.ploughshares.ca/libraries/ACRText/ACR-TitlePageRev.htm#Preface>>.

¹⁶²⁴ Zegveld, ‘Accountability of Armed Opposition Groups in International Law’, *op. cit.*, p. 9-38.

¹⁶²⁵ Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 194.

¹⁶²⁶ Although emergency situation could be an exceptional situation for the application of non-derogable rights; some writers maintain that even in such situations ‘the intent of humanitarian law should be to insist on the respect for such legal principles.’ See Asbjørn Eide, *The Laws of War and Human Rights: Differences and Convergences*, in *Studies and Essays in Humanitarian Law and Red Cross Principles*, Christopher Swinarski (ed.), the Hague: Martinus Nijhoff Publishers, 1998, p. 698.

¹⁶²⁷ Shastri, ‘International Humanitarian Law Relating to Non-international Armed Conflict’, *op. cit.*, p. 214; see also F. Ermacora, Special Rapporteur on the Situation of Human Rights in Afghanistan, UN Doc. A/40/893.

¹⁶²⁸ Moir, ‘The Law of Internal Armed Conflict’, *op. cit.*, p. 194.

¹⁶²⁹ The main purpose of both IHL and HRL is protection of human beings and often share the same objectives and goals, Draper states that both corpora juris were ‘based in their fundamental nature upon the dignity and value of the individual being.’ Meron writes: ‘their basic object is to extend protection to the human person in all circumstances and in all types of conflict and strife.’ T. Meron, ‘Convergence of International Humanitarian Law and Human Rights law’, in D. Warner (ed.), ‘Human Rights and Humanitarian Law’, Kluwer Law international, 1997, pp. 97-105, p. 101.

also be held accountable under international human rights law, especially in situations where the state structure no longer exists or where states are unable or unwilling to mete out punishment for crimes committed by non-state actors.’¹⁶³⁰ For most of the twentieth century it was unclear whether IHRL could be applied to the conduct of states involved in armed conflict with some states maintaining that such situations were governed by the *lex specialis* of humanitarian law, to the exclusion of human rights law.¹⁶³¹

4.6.2 The relationship between IHL and IHRL

The interaction between IHRL and IHL has been debated extensively in recent years.¹⁶³² There has been a growing doctrinal and jurisprudential trend to combine IHL and IHRL where they overlap, in order specifically, to extend the protection of civilians in armed conflicts irrespective of legal characterization.¹⁶³³ Meron equates this growing trend to ‘the sovereignty of states and their insistence on maintaining maximum discretion in dealing with those who threaten their “sovereign authority” have combined to limit the reach of international humanitarian law applicable to non-international armed conflict.’¹⁶³⁴ In fact, as far as classic public international law was concerned the separation between the *corpus juris* of the law of peace and the law of war was recognized and maintained.¹⁶³⁵ This is quite a contrast from the general discourse now in which the main focus of scholarly writings and general practice is the way the two bodies interact.¹⁶³⁶ This is particularly true

¹⁶³⁰ UN Commission on Human Rights, E/CN.4/1999/92? Para 13 (Report of the Secretary General on Fundamental Standard of Humanity, 18 December 1998); see Zegveld, ‘the Accountability of Armed Opposition Groups in International Law’, *op. cit.* p. 46.

¹⁶³¹ J. Cerone, ‘Jurisdiction and Power: the Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extra-territorial Context’, 40 *Israel Law Review* 396, 2007, p. 399-400.

¹⁶³²¹⁶³² There is a wealth of literature on the subject, see for example, D. Schindler, ‘Human Rights and Humanitarian Law’, (1981-2) 31 *American University Law Review*, pp. 935-977; L. Doswold-Beck and S. Vite, ‘International Humanitarian Law and Human Rights Law’, (1993) No. 293 *IRRC* 94-119; F. Hampson, ‘Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts’, (1992) 31 *Revue de droit militaire et de droit de la guerre* 119-142; C. Droege, ‘The Interplay between International Humanitarian Law and international Human Rights Law in Situations of Armed Conflict’, 40 *Israel Law Review* 310 2007.

¹⁶³³ See e.g., *Legal Consequences of the Construction of the Wall In the Occupied Palestinian territory*, 2004 I.C.J. 131 (July 9); The Israeli Supreme Court also dealt with this issue in HCJ 7957/04 *Mara’abe v Prime Minister of Israel* [2005], translated in 45 *ILM* 202 (2006).

¹⁶³⁴ Meron, ‘International Criminalization of Internal Atrocities’, *op. cit.*, p. 554.

¹⁶³⁵ H-J. Heintze, ‘On the Relationship between Human Rights, Protection and International Humanitarian Law’, *IRRC*, December 2004 Vol. 86 No. 856, p. 789.

¹⁶³⁶ It is now accepted that the strict traditional dichotomy between laws of war, implying the application of IHL, and HRL applied in times of peace is not viable anymore. N. Quenivet, ‘The History of Relationship between International Humanitarian Law and Human Rights Law’, in R. Arnold & N. Quenivet (ed.), ‘International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law’,

for situations of internal violence where normal constitutional and other legal checks and balances are singularly ineffective.¹⁶³⁷ However, there are those especially amongst the military practitioners of certain states¹⁶³⁸ who argue vehemently that IHRL and IHL should be kept apart.¹⁶³⁹ There are also prominent human rights defenders advancing good reasons why human rights should not apply to NSAGs.¹⁶⁴⁰ Draper voiced opposition to any fusion or overlap between IHL and HRL and maintained that they were fundamentally of different origin, theories, nature and purpose.¹⁶⁴¹ Nonetheless, it seems that this traditional view is not shared by other scholars that referred to the apparent “fusing,”¹⁶⁴² “meshing,”¹⁶⁴³ “complementarity,”¹⁶⁴⁴ “convergence,”¹⁶⁴⁵ or “confluence”¹⁶⁴⁶ of IHL and HRL.

The interaction between IHL and HRL did not attract much attention until 1960s.¹⁶⁴⁷ The 1968 Tehran conference celebrating the twentieth anniversary of UDHR, was the first time

Martinus Nijhoff Publishers, 2008, pp. 1-12, p. 1; see also C. Stahn, “*jus ad bellum*’, *jus in bello*’ ... *jus post bellum*’? – Rethinking the Concept of Armed Forces, 17 *EJIL* 921 (2007), p. 922.

¹⁶³⁷ T. Meron, ‘Convergence of International Humanitarian Law and Human Rights law’, in D. Warner (ed.), ‘Human Rights and Humanitarian Law’, Kluwer Law international, 1997, pp. 97-105, p. 98.

¹⁶³⁸ By and large, most states accept the application of IHRL in situations of armed conflict and resultant interpretation by of international bodies, with the notable exception of some states such as Israel and the United States; Summary Legal Position of the Government of Israel, Annex I to the Report of the Secretary-General Prepared Pursuant to GA Res., ES-10713, para. 4, UN Doc. A/ES-10/248 (Nov. 24, 2003) (relating to the construction of a wall in the occupied Palestinian territory); Annex I: Territorial Scope of the Application of the Covenant, 2nd and 3rd Periodic Reports of the United States of America, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, UN Doc. CCPR/C/USA/3 (Nov. 28, 2005); Summary Record of the 2380th Meeting: United States of America, at 2, UN Doc. CCPR/C/SR.2380 (July 27, 2006).

¹⁶³⁹ Such a view is put forward by U.S. Army Major Michelle A. Hansen, ‘Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict’, 194 *Military Law Review* 1 2007.

¹⁶⁴⁰ Rodley, ‘Can Armed Opposition Groups Violate Human Rights Standards?’ in Mahoney & Mahoney (ed.), *Human Rights in the Twenty-First Century* (1993), Kluwer A.P., p. 297-318.

¹⁶⁴¹ Although Draper hypothesizes that there are occasions of “overlap” and “contact” the bodies of international law should not and could not be fused in any meaningful manner, describing IHL as “derogation from the normal regime of human rights.” G.I.A.D. Draper, ‘Humanitarian Law and Human Rights’, *Acta Juridica* 193, (1979), p. 199.

¹⁶⁴² F. Rogers, ‘Australia’s Human Rights Obligations and Australia Defence Force Operation’, 18 *University of Tasmania Law Review* 1, (1999), p. 2

¹⁶⁴³ T. Meron, ‘On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument’, 77 *AJIL* 589 (1983).

¹⁶⁴⁴ R. Provost, ‘International Human Rights and Humanitarian Law’, Cambridge U.P., 2002; H-J. Heintze, ‘On the Relationship between Human Rights Protection and International Humanitarian Law’, 856 *IRRC* 789 (2004), p. 794.

¹⁶⁴⁵ Vinuesa, ‘Interface, Correspondence and Convergence of Human Rights & International Humanitarian law’, *op. cit.*, pp. 69-110.

¹⁶⁴⁶ R. Q. Quentin-Baxter, ‘Human Rights and Humanitarian Law-Confluence of Conflict?’ 9 *Australian Yearbook of International Law* 94 (1985).

¹⁶⁴⁷ A comparison between *corpora juris* prompted many observers to come to the conclusion that there was a normative gap between the two body of law particularly in the case of situations of armed conflict where neither Common Article 3 or Additional Protocol II apply Gasser notes that the so-called “hard core” of human rights which may be derogated from even in a time of public emergency closely resembled the fundamental guarantees codified by humanitarian law treaties. Gasser, ‘International Humanitarian Law and Human Rights Law in Non-international Armed Conflict’, *op. cit.*, p. 157.

the issue of human rights in armed conflict was raised.¹⁶⁴⁸ This marked the end of the reciprocal “benign neglect” that had previously prevailed between human rights and humanitarian communities.¹⁶⁴⁹ The first resolution produced by the Tehran Conference of 1968, entitled “Respect and Enforcement of Human Rights in the Occupied Territory” calling upon Israel to abide by both the Universal Declaration of Human Rights and the Geneva Conventions in the occupied Palestinian territories.¹⁶⁵⁰ This approach was reiterated by the General Assembly Resolution 2444 of 19 December 1968 with the same title.¹⁶⁵¹ The latter Resolution urged the UN Secretary General to draft a report on measures to be adopted for the protection of all individuals in situations of armed conflict.¹⁶⁵² As a result of this, the UN General Assembly passed a Resolution affirming ‘basic principles for the protection of civilian populations in armed conflict’ that “fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.”¹⁶⁵³ This approach was adopted by the European Commission on Human Rights in the *Cyprus v. Turkey* (First and Second Applications) case which held that in belligerent operations a state was bound to respect not only the humanitarian law laid down in the Geneva Conventions but also fundamental human rights.¹⁶⁵⁴ Indeed, it was during the 1970s that under the banner of ‘human rights in armed conflict’ adopted by the UN, scholars began to question whether IHL is part of HRL or vice versa mainly due to the adoption of the two abovementioned international human rights Covenants in 1966, the conflicts in Vietnam, southeastern Biafra region of Nigeria and the Israeli occupation of Arab territory in 1967.¹⁶⁵⁵ In fact, the main outcome of the diplomatic conference which finally approved the two Additional Protocols to 1949 Geneva Conventions in 1977 was to

¹⁶⁴⁸ Resolution XXIII ‘Human Rights in Armed Conflict’ adopted by the international Conference on Human Rights, Tehran, 12 May 1968.

¹⁶⁴⁹ This has been described as “*the true turning point, when humanitarian law and human rights gradually began closer.*” H-P. Gasser, ‘International Humanitarian Law and Human Rights Law in Non-international Armed Conflict: Joint Venture or Mutual Exclusion?’, *German Yearbook of International Law*, Vol. 45, 2002, pp. 149-162, p. 154; see also L. Doswald-Beck & S. Vite, ‘Origins and Nature of Human Rights Law and Humanitarian Law’, 293 *IRRC* 95, 112 (1993), p. 95-119.

¹⁶⁵⁰ Final Act of International Conference on Human Rights, UN Doc. A/Conf.32/41 (Apr. 22-May 13, 1968).

¹⁶⁵¹ For text see: <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/244/04/IMG/NR024404.pdf?OpenElement>

¹⁶⁵² The byproduct of this process was two reports by the Secretary General which concluded that human rights law instruments in particular the ICCPR afforded a more comprehensive protection to individuals in situations of armed conflict than the four Geneva Conventions. Respect for Human Rights in Armed Conflicts, Report of the Secretary General, UN Doc. A/7720 (1969).

¹⁶⁵³ UN General Assembly Res. 2675 (XXV), Principles for the Protection of Civilian Populations in Armed Conflict, UN Doc. A/8028, 9 December 1970.

¹⁶⁵⁴ See the Report of the European Commission of Human Rights (the Commission) in the case of *Cyprus v. Turkey*, application nos. 6780/74 and 6950/75, adopted on 10 July 1976, paras. 509-510; see also L.G. Loukaidēs, ‘The European Convention on Human Rights: Collected Essays’, Brill, 2007, pp. 249-251.

¹⁶⁵⁵ K. Suter, ‘Human Rights in Armed Conflicts’, XV *Military Law and Law of War Review* (1976), p. 395.

incorporate fundamental human rights into the protocols in the shape of fundamental minimum guarantees, hence, harmonizing the two Additional Protocols with the United Nations Covenants.¹⁶⁵⁶ But there is one situation in which the latter does not apply and that is during the state of siege or emergency on which Vinuesa notes:

It was important to use the same language in the Protocol. This equation tends to eradicate the factual possibility of situations not contemplated by one legal scheme or the other. Their reciprocal complement is not related to equalization or fusion of norms but to the superimposition of the same normative content as expressed by different systems. In that sense, it has already been stated that fundamental rights of individuals, as accepted and prescribed by international law through international instruments, are applicable during armed conflict.¹⁶⁵⁷

It is significant to this study to note that the preamble of Protocol II specifically acknowledged the continuity of human rights application during internal armed conflicts.¹⁶⁵⁸ In fact, some scholars state that the International Covenant on Civil and Political Rights (ICCPR) and regional human rights treaties contain provisions in which states have the right to declare the state of emergency under Article 4 of the ICCPR¹⁶⁵⁹ and other human rights treaties obligations in times of “public emergency which threaten the life of the nation,”¹⁶⁶⁰ inclusion of which clearly recognizes that IHRL applies to all situations including armed conflict.¹⁶⁶¹ This has been re-affirmed repeatedly by the United Nations Security Council, the UN General Assembly, the now defunct UN Human Right Commission¹⁶⁶² as well as by the International Court of Justice (ICJ) in the case of 1996 Nuclear Weapon Advisory Opinion which deliberated upon the interaction between IHRL and IHL. The Court observed:

... that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby, certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to

¹⁶⁵⁶ See Article 75 of Protocol I and Article 4 to 6 of Protocol II to the Geneva Conventions of 1977.

¹⁶⁵⁷ Vinuesa, ‘Interface, Correspondence and Convergence of Human Rights & International Humanitarian law’, *op. cit.*, p. 74; see also UNGA Res. 2675 (XXV).

¹⁶⁵⁸ The Preamble of Protocol II states, ‘Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person.’

¹⁶⁵⁹ International Covenant on Civil and Political Rights, U.N. GAOR Supp. No. 16, at 52, UN Doc. A/6316 (1966), Art. 4.

¹⁶⁶⁰ It has to be emphasised that such derogation must only be ‘to the extent strictly required by the exigencies of the situation’ – ICCPR, Article 4(1). See also the ECHR, Article 15(1), the ACHR, and Article 27(1). However, the ACHPR contains no derogation clause.

¹⁶⁶¹ Cerone, ‘Jurisdiction and Power’, *op. cit.*, p. 400.

¹⁶⁶² The successor is the United Nations Human Rights Council (UNHRC) established by the General Assembly by adopting resolution (A/RES/60/251) on March 2006.

be deprived of one's life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself. ...¹⁶⁶³

In principle, the right not arbitrarily to deprive of one's life applies also in hostilities.¹⁶⁶⁴ In fact, the ICJ reiterated the position:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between human rights and humanitarian law, there are thus three possible situations: some rights may be exclusively matters of humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.¹⁶⁶⁵

In order to answer the question put to it, the court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.¹⁶⁶⁶ For example, under Article 15 of the European Convention on Human Rights to which Turkey is a party the High Contracting Parties have the right to derogate from some provisions in which 'in time of war or other public emergency threatening the life of the nation', but only 'to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with ... other obligations under international law'.¹⁶⁶⁷ However, there are non-derogable rights such as the right to life, protection against torture, to inhuman or degrading treatment, the right to fair

¹⁶⁶³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. 1996, 226, para. 25; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 196, para. 106 and *Armed Activities on the Territory of the Congo* (Congo v. Uganda), 19 December 2005, ICJ Rep. 2005, 168, Para. 216; in all these cases the protection offered by human rights conventions continue to apply in cases of armed conflict.

¹⁶⁶⁴ V. Gowlland-Debbas, 'The Right to Life and the Relationship between Human Rights and Humanitarian Law', in 'The Right to Life', C. Tomuschat, *et al.* (ed.), Martinus Nijhoff, 2010, 123-151, p. 128.

¹⁶⁶⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* Advisory Opinion, ICJ Report (2004) 136, para. 106.

¹⁶⁶⁶ *Ibid*, paras. 102-106.

¹⁶⁶⁷ Also, the derogating state has to inform the Council of Europe of decisions and their justifications. M. Sassoli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts', in O. Ben-Naftali, 'International Humanitarian Law and International Human Rights Law', Oxford U.P., pp. 34-94, p. 51.

trial and the prohibition of slavery.¹⁶⁶⁸ For the purpose of this study it is important to consider that alongside binding treaty provisions there are many so-called ‘soft law’ standards of relevance to human rights encompassed in such as the UN General Assembly or other international and regional bodies.¹⁶⁶⁹ It has been pointed out that, there exists an increasing soft law in the human rights field – pronouncements of international and non-governmental bodies, some judicial decisions and a growing part of scholarly writings that claim that non-state actors or specifically armed groups have human rights obligations.¹⁶⁷⁰

4.6.3 The relevance of soft law (the protection of civilians)

In recent years there has been a series of initiatives in the shape of various resolutions adopted by organs of international or intergovernmental organizations (whether of legal or non-legal) and reports by international organizations, most notably by the United Nations General Assembly which have emphasized the destructive impact of armed conflict on civilians pertain to the body of “soft law” or *de lege ferenda* (the law as it may be, or should

¹⁶⁶⁸ It is worth noting that other instruments of International Human Right Law have similar rules but the list of non-derogable rights is more far-reaching, See also Art 4 of International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171 (ICCPR) and Art 27 of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978, 1114 UNTS 143 (ACHR).

¹⁶⁶⁹ Although not binding per se but they give more detailed expression to some of the binding prescriptions and prohibitions of international law and may reflect customary law, the Universal Declaration on Human Rights is foremost among the non-party instruments of relevance to human rights and the ‘war on terror’ include: UN ‘Code of Conduct for Law Enforcement Officials’, GA Res. 34/169, 17 December 1979, UN Doc. A/RES/34/169 (1979); Turku Declaration on the Minimum Humanitarian Standards, Helsinki, 2 December 1990; Paris Minimum Standards of Human Rights Norms in a State of Emergency, approved by consensus during the 61st Conference of the International Law Association, Paris, 26 August – 1 September 1984 (reprinted in 79 (1985) AJIL 1072); UN ‘Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment’, GA Res. 43/173, 9 December 1988, UN Doc. A/RES/43/173 (1988); UN Standard Minimum Rules for the Treatment of Prisoners, adopted 30 August 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF/611, Annex I; Basic Principles on the Independence of the Judiciary, UN Doc. A/CONF.121/22/Rev. 1 at 59, adopted at the 1985 Milan Conference and Approved by the UN General Assembly (GA Res.40/32, 29 November 1985 and GA Res. 40/146, 13 December 1985); UN Basic Principles on the Role of Lawyers, adopted at the 8th UN Congress on Crime Prevention 1990; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, the Proclamation of Tehran, proclaimed by the International Conference on Human Rights at Tehran on 13 May 1968 and Johannesburg Principles on National Security, Freedom of Expression and Access to Information, UN Doc. E/CN.4/1996/39; the Declaration on the Elimination of Violence against Women (1993), A/RES/48/104; the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders (1999), A/RES/53/144.

¹⁶⁷⁰ See for an affirmative view: A. Clapham, ‘Human Rights Obligations of Non-state Actors (2006); Clapham, ‘Human Rights Obligations of Non-State Actors in Conflict Situations’, 88 IRRC (2006) 491, at 494-507; Matas, ‘Armed Opposition Groups’, 24 Manitoba L. J. (1997) 621, at 630-634; International Council on Human Rights Policy, ‘Ends and Means: Human Rights Approaches to Armed Groups’, (2000), <http://www.relifweb.inter/library/documents/2001/EndsandMeans.pdf> [last accessed 08 April 2011], at 59-62.

be, in the future).¹⁶⁷¹ In general international law it is sometimes argued that particular non-binding instruments or documents or non-binding provisions in treaties may ultimately form a category which is commonly referred to as ‘soft law’.¹⁶⁷² These instruments are described as ‘soft law’ because they are not directly enforceable in domestic courts and international tribunals.¹⁶⁷³ “Soft law” is described by one scholar as ‘not per se legally binding, may well have a number of legally relevant effects ...’¹⁶⁷⁴ Shaw is of the opinion that ‘soft law’ is not law, he opines that ‘this terminology is meant to indicate that instrument of provision in question is not of itself ‘law’, but its importance within the general framework of international legal development is such that particular attention requires to be paid to it’.¹⁶⁷⁵ As such “soft law” operates in the grey area between international law and politics,¹⁶⁷⁶ Williamson notes that, ‘documents creating soft law include instruments subordinate to a treaty that are not per se binding but that support the purposes of the treaty regime ...’.¹⁶⁷⁷ One of the best examples of “soft law” to subsequently influence the drafting of “hard law” was Article 10 of the ICCPR which was directly inspired by the Standard Minimum Rules for the Treatment of Prisoners adopted in 1955 by the first Congress on the Prevention of Crimes and the Treatment of Offenders.¹⁶⁷⁸ States, however, consider “soft law” texts as a rather political concept in international relations which could eventually lead to law but are not law

¹⁶⁷¹ “Soft” International Law has become an important body of non-treaty standards usually adopted within the framework of the United Nations system (declarations, bodies of principles, standard minimum rules and such like); The concept of soft law in this context is used to distinguish its rules of law (sometimes drawn unilaterally) from those considered to be the classic rules of international law, better known as “hard law”, see F. Bouchet-Saulnier, et al., ‘the Practical Guide to Humanitarian Law’, *op. cit.*, p. 427; for the general information about ‘soft law’ see A.J.P. Tammes, ‘Soft Law’, in ‘Essays of International & Comparative Law in Honour of Judge Erades’, Martinus Nijhoff Publishers, 1983; A. Boyle, ‘Some Reflections on Relationship of Treaties and Soft Law’, 48 *ICLQ* (1999), pp. 901-913; however the concept of ‘soft law’ is not without its detractors, for a critical view of ‘soft law’ see J.K. Klabbers, “The Redundancy of ‘Soft Law’”, 65 *Nordic JIL* (1996), p. 172.

¹⁶⁷² A. Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’, *ICLQ*, 1999, vol. 48, no. 4, p. 901-913.

¹⁶⁷³ See generally O. Schachter, ‘The Twilight Existence of Nonbinding International Agreements’, Editorial Comment (1977) 71 *AJIL* 296; C.M. Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 *ICLQ* 850.

¹⁶⁷⁴ N. Rodley, ‘Soft Law, Tough Standard’, 43:7.3 *Interight Bulletin* (1993), pp. 43-44.

¹⁶⁷⁵ Shaw cites the Helsinki Final Act of 1974 as a prime example of this concept in international law. Although, a non-binding agreement, but in regard to Central Eastern Europe had a profound influence on the role and importance of international human rights law, Shaw, ‘International Law’, 6th ed., pp. 117-118; see also the reference to it in the *Nicaragua* case, ICJ Report, 1986, pp. 3, 100; 76 *ILR*, pp. 349, 434.

¹⁶⁷⁶ Specific “soft” law regarding the Kurdish question includes self-determination, minorities, indigenous peoples, many aspects of human rights and humanitarian intervention, as well as international law of civil war and the right to secession, ‘the Kurdish Question and International law’ in ‘the Kurdish Conflict in Turkey’, St. Martin’s Press, 2000, p. 32-33.

¹⁶⁷⁷ R. L. Williamson, Jr., ‘Hard Law, soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses’, 4 *Chicago Journal of International Law* 59 (2003), p. 63.

¹⁶⁷⁸ Both require law enforcement officials to separate juveniles from adults, and untried from convicted detainees. Subsequently, the *Standard Minimum Rules for the Treatment of Prisoners* were approved by ECOSOC by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

and thus only result in political consequences, in fact, according to Shelton some scholars distinguish hard law and soft law by emphasizing that whereas breach of a law would have legal consequences, breach of a political norm would result in political consequences.¹⁶⁷⁹

However, recently in a series of reports to the Security Council on “protection of civilians in armed conflict” the secretary General of the United Nations, stated that the ‘deliberate targeting of non-combatants’, is a key characteristic of these conflicts, which ultimately results in ‘civilian casualties and the destruction of civilian infrastructure’. But significantly, the report points out that among the main instigators of this violence are ‘non-state actors, including irregular forces and privately financed militias’.¹⁶⁸⁰ In response, the UN Security Council passed Resolutions 1265¹⁶⁸¹ and 1296¹⁶⁸² as well as adopting presidential statements such as S/PRST/2002/6¹⁶⁸³ and S/PRST/2002/41.¹⁶⁸⁴ The latter in particular, contains an “*Aide Memoire*” on the protection of civilian population in armed conflict that the Office for the Coordination of Humanitarian Affairs (OCHA) developed at the request of the Security Council, which is used as a practical guide and a means to facilitate its consideration in regard to protection of civilians in armed conflict.¹⁶⁸⁵ While the Security Council has been at pains to emphasize that provisions for civilians in the course of an armed conflict will be dealt with on case-by-case basis taking into account the particular circumstances of each conflict situation, the “culture of protection” called for by the Security General through the adoption of the *Aide Memoire* in March 2002 is a living proof that this policy is taking root.¹⁶⁸⁶

¹⁶⁷⁹ D. Shelton, ‘Soft Law’, in ‘Routledge International Handbook’, D. Armstrong (ed.), Routledge, 2009, pp. 68-80.

¹⁶⁸⁰ On this particular issue the UN Security General has issued three reports on the Protection of Civilians: Report by the United Nations Secretary General on the Protection of Civilians in Armed Conflicts (S/1999/957) (08 September 1999), for text: www.un.int/canada/html/s1999957.htm; Report by the United Nations Secretary General on the Protection of Civilians in Armed Conflicts (S/2001/331) (30 March 2001), for text: www.un.org/Docs/sc/reports/2001/sgrep01.htm; Report by the United Nations Security General on Women, Peace and Security, S/2002/1154, 16 October 2002; see also Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, [available at www.un.org/Docs/journal/asp/ws.asp?m=S/2004/43.htm]

¹⁶⁸¹ Security Council Resolution 1265 (1999) on the Protection of Civilians in Armed Conflict (S/1999/1265) [available at www.un.org/Docs/scres/1999/sc99.htm]

¹⁶⁸² Security Council Resolution 1296 (2000) on the Protection of Civilians in Armed Conflict (S/2000/1296) [available at www.un.org/Docs/scres/2000/sc2000.htm]

¹⁶⁸³ Statement by the President of the Security Council on the Protection of Civilians In armed Conflict (S/PRST/2002/6) and Annexed “*Aide Memoire*” (15 March 2002), [available at www.un.org/Docs/sc/report/2002/sgrep02.htm]

¹⁶⁸⁴ Statement by the President of the Security Council on the Protection of Civilians In armed Conflict (S/PRST/2002/41) (20 December 2002) [available at www.un.org/Docs/sc/statements/2002/prst2002.htm]

¹⁶⁸⁵ Ibid.

¹⁶⁸⁶ It is debatable, however, that some of the relevant UN resolutions can be considered binding in international law which particularly include UN Security Council resolutions as well as UN General Assembly resolutions that are unanimously adopted; Art 25 of the UN Charter imposes a duty on UN member states to ‘accept and

Undoubtedly, influence of “soft law” in other branches of international law such as environmental law is a lot more tangible than other corpuses of international law such as the IHL.¹⁶⁸⁷ However in the recent years “soft law” has also had an influence on IHL in particular in its interaction with HRL.¹⁶⁸⁸ As stated above, the ICRC has in recent years completed a major study on customary rules, the most outstanding outcome of which relates to the number of rules identified as customary in non-international armed conflict.¹⁶⁸⁹ On this point Andreopoulos notes:

What emerges as a common theme here is the need for identification and better implementation of the already existing normative framework, rather than the need for further codification; in this endeavor, supporting state as well as non-state actor practice is critical. This quest for standard setting can materialize in the adoption of a ‘soft law’ document, incorporating already existing norms to be used as a frame of reference for engagement initiatives with armed groups.¹⁶⁹⁰

Sassoli is of the opinion that such practical difficulties should not discourage us from looking into alternative ways to include NSAGs in the development of soft law standards. He notes:

First, the relationship between any new soft law and hard law obligations of armed groups under the law of non-international armed conflicts would have to be clarified. Second, the additional soft law rules will not be the same as the hard law rules for states. This will lead to a situation in which both sides will not be bound by the same rules, which would be contrary to the principle of equality of the belligerents before IHL.¹⁶⁹¹

carry out the decisions of the Security Council ...’ which clearly includes its resolutions; generally see R. Higgins, ‘The Development of International Law through the Political Organs of the United Nations’, Oxford U.P., 1963, pp. 4-5.

¹⁶⁸⁷ Cassese, ‘International Law’, *op. cit.*, pp. 196-197.

¹⁶⁸⁸ See the Commentary to UN “Basic Principles and Guidelines on the Right to Remedy and Repression for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, Res. 2005/35 of 19 April 2005, approved by the General Assembly in 2005: UNGA Res. A/60/147 of Dec. 16, 2005.

¹⁶⁸⁹ Henckaerts, et al., ‘Customary international Humanitarian Law: Rules’, *op. cit.*, p. 447.

¹⁶⁹⁰ Andreopoulos also makes the point that such soft law documents would increasingly be based on interdependence between HRL and IHL rules within the normative architecture of international law. This is particularly true regarding efforts to engage in dialogue with NSAGs with the ultimate goal of the protection of human dignity in all its aspects in situations of armed conflict. However, there would be further issues raised with development of soft law standards in conjunction with participation of NSAGs. Andreopoulos, ‘The Impact of the War on Terror on Accountability of Armed Groups’, *op. cit.*, p. 180.

¹⁶⁹¹ Sassoli, ‘Transnational Armed Groups and International Humanitarian Law’, *op cit*, p. p. 44.

There are also scholars that see the best way to ensure the protection of victims of war would be enhanced by the use of more ‘progressive’ methods to assess custom and encourage imaginative uses of soft law.¹⁶⁹²

4.6.4 Minimum humanitarian standard applicable to any armed conflict

Eventually, it took a private initiative by a group of experts and academics in 1990, to draft the so-called Turku Declaration of Minimum Humanitarian Standards, which amalgamated the common principles and norms that existed in both IHL and HRL into a single document. It declared principles “which are applicable in all situations, including internal violence, disturbances, tensions and public emergency.”¹⁶⁹³ As suggested, one of the primary reasons for developing of the declaration was the fact that NSAGs are not party to human rights treaties, hence considered a major shortcoming of the law in protection of individuals in internal armed conflicts.¹⁶⁹⁴ It has been noticed elsewhere that the origins of the Turku Declaration could be traced back to the Diplomatic Conferences which eventually produced the two Additional Protocols to the Geneva Conventions in 1977, which incidentally coincided with the coming into force of ICCPR in 1976.¹⁶⁹⁵ Inspired by this event this idea was originally promoted in academic discourse by Professor Theodor Meron. He deserves a specific mention in this regard since he was one of the first scholars to advocate a minimum humanitarian standard to fill in the “grey zone”¹⁶⁹⁶ specifically in low-intensity conflicts which was neither recognized as an armed conflict nor states accepting any responsibility

¹⁶⁹² D. Fleck, ‘International Accountability for Violations of the *Jus in Bello*: The Impact of ICRC Study in Customary International Humanitarian Law’, (2006) 11 *JCSL* 179, p. 185.

¹⁶⁹³ The Turku Declaration of Minimum Humanitarian Standards, UN Doc. E/CN.4/Sub.2/1991/55; text published (among others) in *IRRC*, No. 282, 1991, 330.

¹⁶⁹⁴ Zegveld, ‘Accountability of Armed Opposition Groups’, *op. cit.*, p. 49.

¹⁶⁹⁵ In fact Scheinin notes that ‘a comparison of the resulting frameworks of international humanitarian law and human rights law led many observers to the conclusion that there was a protection gap in respect of situations that did not amount to an armed conflict in the meaning of the 1949 Geneva Conventions, or of Protocol II of 1977, but nevertheless allowed states to declare a state of emergency and to resort to the derogation clauses in the ICCPR and certain other human rights treaties.’ M. Scheinin, ‘Turku/Åbo Declaration of Minimum Humanitarian Standards (1990)’, International Council of Human Rights Policy & International Commission of jurists Workshop, Standard Setting: Lessons Learned for the Future, Geneva, 13-14 February 2005, p. 1; for text: <http://www.ichrp.org/files/papers/91/120B>.

¹⁶⁹⁶ Asbjørn Eide, A. Rossas & T. Meron, ‘Combating Lawlessness in Grey Zone Conflicts Through Minimum Humanitarian Standards’, 89 *AJIL* 217 (1995), 217.

under IHRL.¹⁶⁹⁷ It has also been referred to in the case-law of the ICTY as well as a variety of experts' documents.¹⁶⁹⁸

Article 1 of the Turku declaration sets forth that minimum standards are to be applied to 'all situations, including internal violence, disturbances, tensions, and public emergency', and cannot be derogated from under any circumstances ... whether or not a state of emergency has been proclaimed.'¹⁶⁹⁹ Article 2 states that the standards would apply to 'all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination.' The fundamental guarantees in the remaining articles very much mirror those contained in Common Article 3,¹⁷⁰⁰ which include in Article 3 that everyone has the right to be recognized before the law, respect for their person, honor and conviction, freedom of thought, conscious and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. Article 3 also sets out acts which are deemed prohibited, namely:

- a) Violence to the life, health and physical or mental well-being of persons, in particular murder, torture, mutilation, rape, as well as cruel, inhumane or degrading treatment or punishment and other outrages upon personal dignity;
- b) Collective punishment against persons and their property;
- c) The taking of hostage;
- d) Practicing, permitting or tolerating the involuntary disappearance of individuals, including their abduction or unacknowledged detention;
- e) Pillage;
- f) Deliberate deprivation of access to necessary food, drinking water and medicine;
- g) Threats or incitement to commit of the foregoing acts.

In Article 4 the rights of individuals under detention are set out, which compared to Common Article 3 are more detailed. It set forth that individuals deprived of their liberty shall be held in recognized places of detention; precise information regarding their detention

¹⁶⁹⁷ T. Meron, 'Towards a Humanitarian Declaration in Internal Strife', *AJIL*, vol. 78 (1984), pp. 859-868; in this regard see also L. Zegveld, 'the Inter-American Commission on Human Rights and International Humanitarian Law. A comment on the *Tablada* case', *IRRC*, No. 324 (1998), pp. 505-511.

¹⁶⁹⁸ *Prosecutor v. Tadic*, Decision of 2 October 1995, Case No. IT-94-1-AR-72.

¹⁶⁹⁹ According to Doswald-Beck and Vite, 'that determination find expression in a succession of provisions based alternatively on the spirit of human rights law (for example the prohibition of torture and the principle of habeas corpus) and on the spirit of humanitarian law (for example the prohibition on harming individuals not taking part in hostilities and the obligation to treat wounded and sick persons humanely)', L. Doswald-Beck & S. Vite, 'International Humanitarian Law & Human Rights Law', *IRRC*, no. 293, March-April 1993, pp. 94-119.

¹⁷⁰⁰ Yildiz & Breau, 'The Kurdish Conflict: International Humanitarian and Post-Conflict Mechanism', *op. cit.*, p. 80.

and whereabouts, including transfers, shall be made promptly available to their family members and counsel or other persons having a legitimate interest in the information. The detained individuals according to paragraph 4(2) shall be allowed communication with the outside world including counsel as well as to challenge their detention before a competent authority, as well as the right to an effective remedy, including habeas corpus.¹⁷⁰¹ Some have described these guarantees as reminiscent of Geneva Prisoner of War Conventions, in which other specific human rights guarantees such as the right to life (Article 8), the right to a fair trial and judicial guarantees (Article 9), and right to judicial review of detention on regular basis (article 11) are explicit.¹⁷⁰²

Determination to develop minimum humanitarian standards has been an ongoing process that culminated in the Moscow Declaration of 1991 and the Budapest International Summit in 1994, largely building upon the work done in the Turku Declaration.¹⁷⁰³ On its part, the UN Human Rights Commission asked the Secretary General to compile an analytical report in conjunction with the ICRC, on the issue of fundamental rules of humanity, taking into account: the rules common to human rights and international humanitarian law which are applicable in all situations.¹⁷⁰⁴ The purpose of the Secretary General's report to the 1998 Commission was not to reach firm conclusions on the topic in hand but to set out the framework for the future dialogue on the issue of fundamental standards of humanity.¹⁷⁰⁵ As a result, a number of issues were considered ranging from common characteristics and patterns of human rights abuses in situations of internal violence; provisions in relation to derogation in IHRL; NSAG and human rights law; lack of specificity of existing human rights rules; the scope of application of IHL to situations of internal violence and conflict; customary IHL; the advantages and disadvantages of identifying fundamental standards of humanity. The Report focuses on the need for identifying fundamental standards of humanity arising from the fact that it is often situations of internal strife that pose the biggest threat to human dignity and freedom. It pays particular attention to the link between human rights abuses and ongoing violence and confrontation. However, there is a lack of unanimity on the applicable norms of both human rights and humanitarian law. Lastly, there are disagreements

¹⁷⁰¹ Turku Declaration, *op. cit.*, Article 4(3).

¹⁷⁰² Yildiz & Breau, 'the Kurdish Conflict: International Humanitarian and Post-Conflict', *op. cit.*, p. 81.

¹⁷⁰³ See the Report of Sub-Commission on Prevention of Discrimination and Protection of Minorities in their 46th Session in 1995, UN Doc. E/CN.4/1995/116 (1995).

¹⁷⁰⁴ Shasthri, 'International Humanitarian Law Relating to Non-international Armed Conflict', *op. cit.*, p. 217.

¹⁷⁰⁵ Minimum humanitarian standards, Analytical Report of the Secretary General submitted pursuant to the Commission on Human Rights, Resolution 1997/21, UN Doc. E/CN.4/1998/87, 5 January 1998, [Hereinafter Minimum Humanitarian Standards Report].

regarding the point at which internal violence reaches a threshold where upon IHL rules come into operation, and even when these rules manifestly do apply, it is generally acknowledged that they provide a bare minimum of protection.¹⁷⁰⁶ This development was the beginning of a new process related to protection of victims in ‘situations of internal violence [that] pose a particular threat to human dignity and freedom.’¹⁷⁰⁷ Consequently, the work of the United Nations aims at ‘strengthening the practical protection through the clarification of uncertainties in the application of existing standards in situations, which present a challenge to their effective implementation.’¹⁷⁰⁸ The call for a more uniform adherence to this approach was reflected in the adopted Resolution during the Berlin Session of the Institute of International Law in 1999, on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which NSAGs are involved. The Resolution says ‘all parties to armed conflicts in which non-state entities are parties, irrespective of their legal status, as well as the United Nations, and component regional and other international organizations have the obligation to respect international humanitarian law as well as fundamental human rights law.’¹⁷⁰⁹

Although applicability of human rights law to the behaviour of NSAGs remains highly controversial, the practice of international organizations is pointing towards increased accountability of those actors for human rights violations, at least at the political level. From a legal point of view, such accountability seems to be more accepted when NSAGs exercise control over territory or a segment of the population, or when core human rights norms are at stake.

¹⁷⁰⁶ Ibid, Further, the report noted: ‘until now, the rules of international human rights law have generally been interpreted as only creating legal obligations for governments, whereas in situations of internal violence it is also important to address the behavior of non-state armed groups; it is also argued that some human rights norms lack the specificity required to be effective in situations of violent conflict. Finally, concern has been expressed about the possibilities for Governments to derogate from certain obligations under human rights law in these situations.’ The study looked into three issues of terminology in regards to involvement of NSAGs and armed conflict. To start with, the report having considered terms such as “minimum humanitarian standards” and “fundamental standard of humanity” came to the conclusion that the term “standard of humanity” is preferable. The report adopted the term “internal violence” as description of situations where fighting and conflict is taking place within the borders of a sovereign state regardless of its intensity. However, the report had to deal with the very politically contentious issue of how to describe NSAGs commonly branded by states as terrorist organizations, guerrillas and those groups describing themselves as freedom fighters and resistance movements. It adopted the neutral term of “armed group” without considering any issues regarding legitimacy of the groups or their causes since its main preoccupation was extension of the protection of civilians in the so-called low-intensity warfare; see also Shastri, ‘International Humanitarian Law Relating to Non-international Armed Conflict’, *op. cit.*, p. 219.

¹⁷⁰⁷ See UN Doc. E/CN.4/2002/103, para. 2; UN Doc. E/CN.4/2001/91, para. 4; UN Doc. E/CN.4/2000/94, para. 7-12; UN Doc. E/CN.4/1999/92, para. 3.

¹⁷⁰⁸ UN Doc. E/CN.4/2006/87

¹⁷⁰⁹ Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in Which Non-State Entities are Parties, Institute of International Law, Berlin Session, 25 August 1999.

4.7 NSAGs and terrorism

‘The evil in the tale may be understood, if not excused, by our circumstances’¹⁷¹⁰

4.7.1 Introduction

Since the time immemorial, terror has been deployed as a means of warfare by states and non-state actors. In reality, as one commentator has noted, ‘terrorism is total war: the end justifies the means.’¹⁷¹¹ Both war and terrorism are two terms referring to the phenomena of collective violence which according to Sassoli are used in common parlance by politicians, social scientists as well as lawyers in relation to the law regulating behavior in armed conflicts.¹⁷¹² War is better defined in law than the phenomenon of terrorism, and ‘at least in law, the term inherently puts two parties on an equal footing.’¹⁷¹³ Nowadays, terrorism necessarily implies to most observers acts against states and their citizens rather than acts by states.¹⁷¹⁴ Furthermore, terrorism seems to be an integral part of contemporary armed conflicts and the use of terrorist tactics has become one of the main features of these conflicts.¹⁷¹⁵ This is in light of the fact that most acts of terrorism are committed against the persons who can grant the wishes of terrorists namely helpless civilians.¹⁷¹⁶ From the outset in regard to the contentious issue of terrorism it has to be made clear that the political objects of a NSAG does not justify violation of IHL committed by that group and by the same token using a motive of counter terrorism does not erase or mitigate the responsibility on the part of a state not to respect IHL. States faced with the specter of terrorism have to strike a proper balance between the interest of liberty and protection of security.¹⁷¹⁷

Moreover, no other word in any vocabulary evokes so much emotion as “terrorism”.¹⁷¹⁸ It has also been noticed that even democratic countries do not escape from this predicament.¹⁷¹⁹ The

¹⁷¹⁰ T. Lawrence, ‘Seven Pillars of Wisdom: Complete 1922 Oxford Text’, J&N Wilson, London, 2004, p. 8.

¹⁷¹¹ H-P Gasser, ‘Prohibition of Terrorist Acts in International Humanitarian Law’ [July-August 1986] 68 (253) *IRRC* 200.

¹⁷¹² M. Sassoli, ‘Terrorism and War’, *JICJ*, vol. 4, No. 5, 959-981, (2006), p. 959.

¹⁷¹³ Sassoli, *ibid*.

¹⁷¹⁴ Detter, ‘The Law of War’, *op. cit.*, p. 21.

¹⁷¹⁵ Stepanova, ‘Terrorism in Asymmetrical Conflict’, *op. cit.*, p. 1.

¹⁷¹⁶ Detter, ‘The Law of War’, *op. cit.*, p. 24; Sassoli, ‘Terrorism and War’, *op. cit.*, p. 967.

¹⁷¹⁷ N. Keijzer, ‘Terrorism as a Crime’, in W. P. Heere (ed.), *Terrorism and the Military: International Legal Implications*, TMC Asser, 2003, pp. 115-132, p. 118.

¹⁷¹⁸ P. Wilkinson, ‘Terrorism and the Liberal State’, Macmillan, London, 1977, p. 48; Van Krieken, P. (ed.), ‘Terrorism and International Legal Order’, Asser Press, 2002, p. 14.

¹⁷¹⁹ Jean-Marc Sorel, ‘Some Question about the Definition of Terrorism and the Fight against Financing’, *EJIL*, (2003), Vol. 14 No. 2, 365-378, p. 367; in the case of a liberal democracy such as the United Kingdom

British and Spanish governments for instance have always maintained that their campaigns against the Irish Republican Army (IRA) and the Basque Nationalist and Separatist Organization (ETA) have never been treated as armed conflicts and refer to them as internal disturbance and police operation.¹⁷²⁰

In practice, in regards to NSAGs, terrorism and guerrilla warfare may merge into each other since both methods of warfare are irregular.¹⁷²¹ As Perez-Gonzalez notes ‘sometimes the boundary between terrorist activity and acts of war authorized by the law of armed conflicts is blurred and on a more general level, may even contribute to difficulties in reaching a generally agreed definition of terrorism.’¹⁷²² As noted elsewhere, the notion of ‘terrorism’ and ‘terrorist’ entered political discourse in the eighteenth century by the Jacobins during the French revolution.¹⁷²³ The issue of terrorism, however, since the early twentieth century has been synonymous with NSAGs and has become a preferred mode of resistance for such armed groups, culminating in the Bolsheviks seizure of power in the October Revolution 1917,¹⁷²⁴ which referred to ‘terrorism’ as a means of class struggle.¹⁷²⁵

It was at the end of the Second World War, which also coincided with the beginning of the Cold War that the debate regarding “terrorism” became mired in ideological cleavages and proxy violence.¹⁷²⁶ The situation which ensued led to political deadlock in that made it impossible for the international community to find consensus in relation to outlawing terrorism, while creating an exception for ‘legitimate’ freedom fighters exercising their right of self-determination, resisting an occupying force or political opponents of dictatorial

grappling with the Irish terrorism on its soil, see Donohue, L., ‘Counter-terrorist Law and Emergency Powers in the United Kingdom 1922-2000’, 1st ed., Irish Academic Press, 2001.

¹⁷²⁰ Reservation by the United Kingdom to Art 1(4) and Art 96(3) of Additional Protocol I, available online at <http://www.icrc.org/ihl.nsf>; H. McCoubrey & N.D. White, ‘International Law and Armed Conflict’, Aldershot & Vermont: Dartmouth Publishing, 1992, p. 318.

¹⁷²¹ Schwarzenberger, ‘Terrorists, Guerrilleros, and Mercenaries’, *op. cit.*, p. 71; Barnes, ‘Of Vanishing Points and Paradoxes: Terrorism and International Humanitarian Law’, *op. cit.*, p. 129-30.

¹⁷²² M. Perez-Gonzalez, ‘Combating Terrorism: An International Humanitarian Law Perspective’, in ‘International Legal Dimension of Terrorism’, P-A. Fernandez-Sanchez (ed.), Martinus Nijhoff Publishers, 2009, pp. 253-274, p. 255.

¹⁷²³ R.A. Freedlander, ‘Terrorism and International Law: What is Being Done?’ 8 *Rutgers Camden Law Journal* 384 1976-1977, p. 384.

¹⁷²⁴ According to Service, ‘They glorified terrorist ideas and gloried in their application’, R. Service, ‘Trotsky: a Biography’, Macmillan, 2009, p. 267.

¹⁷²⁵ Saul, ‘Defining Terrorism in International Law’, *op. cit.*, p. 2; see also L. Trotsky, ‘Terrorism and Communism: A Reply to Karl Kautsky’, New Park, London, 1975, pp. 75-79, a text which throughout the Twentieth Century inspired many revolutionaries around the world that resort to terrorism in search of self-determination was a legitimate tactic.

¹⁷²⁶ A. Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, *JICJ* 4 (2006), 933-958, p. 942;

regimes.¹⁷²⁷ As Chomsky observed in 1991; ‘More normal pattern is for actions undertaken against oppressive regimes and occupying armies to be considered resistance by their perpetrators and terrorism by the rulers, even when they are non-violent.’¹⁷²⁸

4.7.2 Terrorist v. freedom fighter

Historically, the distinction between a terrorist and a freedom fighter was decided according to their political standpoint and the level of recognition they were granted regionally as well as internationally.¹⁷²⁹ It should not be forgotten that in the not so distant past many individuals and groups which were labelled as terrorist initially in certain quarters,¹⁷³⁰ subsequently, achieved political legitimacy and recognition.¹⁷³¹ It is worth noting that the on-going debate about the issue of terrorists versus freedom fighters came to the fore as a by-product of insurgencies and counter-insurgencies during the Cold War and the process of decolonization.¹⁷³² As noted above, it could be argued that in the post-1945 era organizations such as national liberation movements were exercising their right to self-determination enshrined in the Charter of the United Nations, whereas, in many cases NSAGs operating today mostly in the post-modern fragmented states lack such recognition and legitimacy.¹⁷³³ Nevertheless, in the context of NSAGs there has to be a clear demarcation between what is the legitimate struggle of peoples for self-determination and terrorism.¹⁷³⁴ Also, there has to be clear distinction between fully-fledged internal armed conflict in which organized NSAGs challenge the legitimacy of a state and low-intensity and sporadic violence by a small group of armed individuals.¹⁷³⁵ In the *Delalic* case the Trial Chamber of the ICTY posited that ‘in

¹⁷²⁷ T. Weigend, ‘The Universal Terrorist: the International Community Grappling with a Definition’, *JICJ* 4 (2006), 912-932, p. 919.

¹⁷²⁸ N. Chomsky, ‘International Terrorism: Image and Reality’, in ‘Western State Terrorism’, Alexander George (ed.), Polity Press, 1991, p.

¹⁷²⁹ Wilson, ‘International Law and the Use of Force by National liberation Movements’, *op. cit.*, pp. 117-118.

¹⁷³⁰ Saul points out that in the case of the Arab-Israeli conflict, Zionist IRGUN leaders such as Menachem Begin, a future prime minister of Israel, were never brought to justice for alleged ‘terrorist’ crimes committed in the course of the violent struggle to establish the state of Israel; Saul, ‘Defining Terrorism in International Law’, *op. cit.*, p. 125.

¹⁷³¹ ‘Mandela taken off US terror list’, 1 July 2008, <http://news.bbc.co.uk/2/hi/americas/7484517.stm>

¹⁷³² This debate has been very difficult to settle since there is currently no comprehensive international legal definition of ‘terrorism’; see also J. Klabber, ‘Rebel With a cause? Terrorists and Humanitarian Law’ *EJIL* (2003), Vol. 14 No. 2, pp. 299-312; Pejic, ‘Terrorist Acts and Groups: A Role for International Law?’, *op. cit.*, pp. 71-100.

¹⁷³³ UN Doc. A/56/PV.14 (2001) 11

¹⁷³⁴ See e.g. G. Aldrich, ‘The Laws of War on Land’, *AJIL* (2000) 42, p. 59; also e.g. R.A. Friedlander, ‘Terrorism and National Liberation Movements: Can Rights Derive from Wrongs?’, *op. cit.*, pp. 281-2.

¹⁷³⁵ See generally Bond, ‘The Rules of Riot: the Internal Conflict and the Law of war’, *op. cit.*; Kalshoven, ‘Guerrilla and Terrorism in Internal Armed Conflict’, *op. cit.*, p. 67.

order to distinguish from the case of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of the organization of the parties involved.¹⁷³⁶ Chomsky for instance uses the issue of Kosovo as an example of this idea where the Kosovo Liberation Army (KLA) in a sequence of events culminating in the attack by the American and NATO forces upon Serbia was turned from a terrorist organization into freedom fighters, where upon the end of the hostilities those freedom fighters and their associates became terrorists again.¹⁷³⁷ Another example is the Palestinian issue, where the Arab and Muslim world consider Hamas as freedom fighters exercising their right to self-determination,¹⁷³⁸ whereas Israel considers the Palestinian group Hamas operating in the Gaza portion of the Palestinian territories in particular as a terrorist organization.¹⁷³⁹

Nevertheless, this depends very much on labelling, perception and most importantly political considerations, as Dugard rhetorically enquires, ‘are the Israel Defence Forces (IDF) engaged in lawful military action or in state terror? Are the Palestinian militants and suicide bombers terrorists or freedom fighters?’¹⁷⁴⁰

Similarly, the detailed definition of terrorism in the 1999 Organization of African Union (OAU) Convention on the Prevention and Combating Terrorism adopted by the Organization of African Unity, specifically excludes the ‘struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces.’¹⁷⁴¹ Interestingly, it is the very freedom fighters that the EU sought to exclude in its draft statement from the scope of terrorism under the EU Framework Decision. The decision excludes ‘the conduct of those who have acted in the interest of preserving or restoring ...

¹⁷³⁶ *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-T, Judgement, 20 February 2001, 16 November 1998, para. 184.

¹⁷³⁷ N. Chomsky, ‘9-11’, Seven Stories Press, 2001, p. 91; for further information for KLA see Henry H. Perritt, ‘Kosovo Liberation Army: the Inside Story of an Insurgency’, University of Illinois Press, 2008; K.D. Heath, ‘Could we Have Armed the Kosovo Liberation Army?, the New Norms in Intervention in Civil War’, 4 *UCLA J. Int’l L. & Foreign Aff.* 251 1999-2000.

¹⁷³⁸ The 1998 Arab Convention for the Suppression of Terrorism provides in Article 2(a) that ‘All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with principles of international law, shall not be regarded as an offence. This provision shall not apply to any act prejudicing the territorial integrity of any Arab state; see also the 1999 Convention of the Organization of the Islamic Conference (OIC) on Combating International Terrorism (OIC Convention), which in its Preamble ‘condemns terrorism and stresses its unjustified nature’ but in Article 2(a) explicitly excludes amongst others Palestinian struggle from the purview of the said Convention.

¹⁷³⁹ T.R. Mockaitis, ‘The New Terrorism: Myth and Reality’, Praeger Publishers, 2006, p. 33.

¹⁷⁴⁰ J. Dugard, ‘The Problem of the Definition of Terrorism in International Law’, In ‘September 11, 2001: A turning Point in International and Domestic Law’, *op. cit.*, pp.198-199; see also Tarik Kafala & Martin Asser, ‘Analysis: Palestinian Suicide Attacks’, BBC News, available at http://news.bbc.co.uk/2/hi/middle_east/3256858.stm (last updated 29 January 2007).

¹⁷⁴¹ ‘OAU Convention on the Prevention and Combating of Terrorism’, Algiers, 14 July 1999, Article 3(1).

democratic values ... as was notably the case in some member states during the Second World War.¹⁷⁴² However, it has to be emphasised that such statements have not been adopted by the EU as binding interpretation of legislation.

The most illustrative example of this conundrum in recent years is the case of the Afghani Mujahedeen forces fighting the Soviet occupiers at the height of the Cold War.¹⁷⁴³ It is a well-known fact that their campaign during the 1980s was supported and financed covertly by the US government as well as being considered by the West as freedom fighters.¹⁷⁴⁴ Upon getting rid of the Soviet occupying forces a sizeable portion of the Mujahedeen later formed the *de facto* government of Taliban wreaking havoc through Afghanistan and beyond.¹⁷⁴⁵ Yet, once removed from power in 2001 by the US led coalition forces, however, in the eyes of the West mainly due to their association and harbouring of Al-Qaeda¹⁷⁴⁶ they were branded as terrorists.¹⁷⁴⁷ The new episode of this bloody conflict and its opposing views is being played out in Afghanistan. The question that still persists is whether the Taliban fighters are terrorists or freedom fighters resisting foreign occupation.¹⁷⁴⁸ There are many other examples of such diversity of perceptions which exists around the globe.¹⁷⁴⁹ However, in regards to freedom fighters and terrorists, Barnidge warns: ‘one must be careful not to overlook the political dynamic according to which acts of violence associated with particular ‘root causes’ continue to be glossed away, and selectively covered and condemned.’¹⁷⁵⁰

Opinions in this regard are somewhat divided. On the one hand, Schachter is of the opinion that this dichotomy misses the point simply because ‘... it does not mean that a person ‘fighting for freedom’ cannot be a terrorist.’¹⁷⁵¹ Bassiouni on the other hand expresses the view that freedom fighters can employ terrorist means. He states: ‘While the term “terrorism”

¹⁷⁴² EU Council, Outcome of Proceedings of 6 December 2001, Statement No. 2, Council Doc. 14845/1/02, 15.

¹⁷⁴³ See M. Galeotti, ‘Afghanistan: the Soviet Union’s Last War’, Routledge, 2001.

¹⁷⁴⁴ Neamatollah, Nojumi, ‘The Rise of Taliban in Afghanistan: Mass Mobilization, Civil War, and the Future of the Region’, Palgrave Macmillan, 2002, p. 188.

¹⁷⁴⁵ For BBC’s online overview of the Taliban see: ‘Who are the Taliban’, text available at: http://news.bbc.co.uk/2/hi/south_asia/1549285.stm.

¹⁷⁴⁶ See generally J. Burke, ‘Al-Qaeda: The Story of Radical Islam’, Penguin Books, 1st ed. 2004.

¹⁷⁴⁷ J. H. Campos, ‘The State and Terrorism: National Security and the Mobilization of Power’, Ashgate, 2007, p. 103; this metamprphesis can be seen in the perception of the successive US Administrations.

¹⁷⁴⁸ Müller, ‘Legal Issues Arising from the Armed Conflict in Afghanistan’, *op. cit.*

¹⁷⁴⁹ Bassiouni, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors’, *op. cit.*, pp. 782-783.

¹⁷⁵⁰ Barnidge, ‘Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle’, *op. cit.*, p. 48.

¹⁷⁵¹ O. Schachter, ‘The Lawful Use of Force by a State against Terrorists in another Country’, In ‘Terrorism and Political Violence: Limits & Possibilities of Legal Control’, Henry H. Han (ed.), Oceana Publishers, 1993, p. 244.

clashed with the legitimacy of such a right to engage in a war of national liberation or to topple dictatorial regimes, it properly described the means employed to those ends.¹⁷⁵²

This is the very consequence of the way in which descriptive language has been used and abused by sovereign states and NSAGs challenging their legitimacy.¹⁷⁵³ In the past several decades, state actors brand many acts of insurgency on their territory as “terrorism”, which in turn has prompted NSAGs to label state actors’ conduct as “state terrorism”.¹⁷⁵⁴ Richard Baxter, formerly of the International Court of Justice, stigmatizes the usage of the term and considers accusations of terrorism in contemporary rhetoric as imprecise, ambiguous, and above all serving no operative legal purposes, particularly, in such cases where crimes of violence or war have been committed.¹⁷⁵⁵ His scepticism is also shared by Rosalyn Higgins who notes that ‘terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of states or individuals, wisely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.’¹⁷⁵⁶

Nevertheless, due to the state-centric nature of international law, states’ efforts are generally aimed at criminalizing and limiting acts of violence to their domestic criminal codes.¹⁷⁵⁷ According to Chadwick, acts instigated by small groups and cells are rarely viewed by sovereign states as reaching the intensity to cross the thresholds of armed conflict regulated by the Geneva Conventions of 1949 or the Hague Conventions of 1907.¹⁷⁵⁸ Hence, there is a clear advantage on the part of NSAGs to increase the intensity of violence, enhancing the prospects of IHL violation and its subsequent application in such conflicts.¹⁷⁵⁹ Consequently, by increasing the intensity of the conflict the NSAGs involved can distinguish themselves

¹⁷⁵² M. C. Bassiouni, ‘Legal Control of International Terrorism: A Policy oriented Assessment’, 43(1) *Harv. Int’l L.J.* 83, (2002), p. 97.

¹⁷⁵³ R.P. Barnidge, ‘Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle’, TMC Asser Press, 2008, p. 42.

¹⁷⁵⁴ M.C. Bassiouni, ‘Reflections on Legitimacy and Policy Considerations’, in ‘Values and Violence: Intangible Acts of Terrorism’, Wayne McCormack (ed.), Springer, 2008, pp. 233-256.

¹⁷⁵⁵ R.R. Baxter, ‘A sceptical Look at the Concept of Terrorism’, 7 *Akron L. Rev.* 380 (1974), p. 381.

¹⁷⁵⁶ R. Higgins, ‘The General international Law of Terrorism’, in Higgins & Flory (ed.), ‘Terrorism and International Law’, Routledge, 1997, pp. 13-29.; see also Mallison et al., ‘the Concept of Public Purpose Terror in International Law: Doctrines and Sanctions to Reduce the Destruction of human and Material Values’, in M. Cherif Bassiouni, ‘International Terrorism and Political Crimes’, Charles Thomas Publishers, 1975, p. 67.

¹⁷⁵⁷ See R.F. Devlin, ‘Laws Centaurs: An Inquiry into the Nature and Relation of Law, State and Violence’, 27 *Osgood Hall Law Journal* 219 (1989).

¹⁷⁵⁸ Chadwick, ‘Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict’, *op. cit.*, p. 92; see also M-C Sornarajah, “‘Terrorism’ Not Useful for Analyzing Random violence” (1999) 03 *ASIL Proceedings* 79.

¹⁷⁵⁹ Bassiouni, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors’, *op. cit.*, p. 745.

worthy of being considered as combatants rather than mere terrorists.¹⁷⁶⁰ On this very point Perez-Gonzalez opines:

It is precisely the discrepancies over the status of certain groups in the context of an armed conflict or situations of occupation, described by some as liberation groups (guerrillas) or resistance groups and by others as terrorists, which is the sticking point for states in their attempts to reach an agreed definition of terrorism.¹⁷⁶¹

4.7.3 Lack of a universal definition of terrorism in international law

There are obligations imposed under international law on states to prevent and repress terrorism, but have failed to define it.¹⁷⁶² The lack of an overarching binding definition of terrorism is often cited as indication of inability of international law to deal with this issue.¹⁷⁶³ Schachter argues that:

This does not mean that international terrorism is not identifiable. It has a core meaning that all the definitions recognize. It refers to the threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce it to meet political (or quasi-political) objectives of the perpetrators. Such terrorist acts have an international character when they are carried out across national lines or directed against nationals of a foreign state or instrumentalities of that state.¹⁷⁶⁴

In the past the international community has made many attempts to deal with the issue of terrorism.¹⁷⁶⁵ Petman highlights the perverse logic at the centre of achieving a definition for

¹⁷⁶⁰ Kalshoven, 'Guerrilla and Terrorism in Internal Armed Conflict', *op. cit.*, p. 67.

¹⁷⁶¹ M. Perez-Gonzalez, 'Combating Terrorism: An International Humanitarian Law Perspective', *op. cit.*, p. 255.

¹⁷⁶² E. Stubbins-Bates, 'Terrorism and International Law: Accountability, Remedies, and Reform, a Report of the IBA Task Force on Terrorism', Oxford U.P., 2011, p. 1.

¹⁷⁶³ Y. Dinstein, 'The War on Terrorism' in 'International Legal Dimension of Terrorism', P. A. Fernandez-Sanchez (ed.), Martinus Nijhoff Publishers, 2009, pp. 241-252, p. 245; The formula adopted by the U.N. rests along the lines of the following: "deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms ..." see e.g. U.N.S.C. Resolution 1044 (31 January 1996), S/RES/1044 (1996). Furthermore, Council of the European Union, Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), in which "terrorist act" is defined in Article 3, and the perpetrators identified in the Annex; see also J. Dugard, 'The Problem of the Definition of Terrorism in International Law', In "September 11, 2001: A turning Point in International and Domestic Law", pp. 187-189, Paul Eden & Therese O'Donnell (ed.), Transnational Publishers, 2005, pp. 187&189; see also D. Fleck, 'International Humanitarian Law after September 11: Challenges and the Need to Respond', *YIHL*, Vol. 6, December 2003, pp. 41-71.

¹⁷⁶⁴ Schachter, 'The Lawful Use of Force by a State against Terrorists in another Country', *op. cit.*, p. 210.

¹⁷⁶⁵ See generally B. Saul, 'Attempts to Define 'Terrorism' in International Law', *NILR*, LII: 57-83, 2005, p. 58.

terrorism as such ‘everyone tries to include one’s adversaries in the definition while keeping one’s allies and one’s own (actual or potential) activities outside it.’¹⁷⁶⁶

Bernard Lewis, a prominent historian and Islamist, somewhat brutally observed that the reason the UN and the international community at large have been impudent to develop measures to combat international terrorism is the fact that many of the governments represented in the UN achieved their authority through the use of terror and violence.¹⁷⁶⁷

Arendt also notes that many modern political communities were founded on violence and often involved ‘terrorist’ methods, thus originated in what today will be perceived as a crime.¹⁷⁶⁸ Most Americans are oblivious to the fact that the use of purposeful terror for political ends was an integral part of the American Revolution.¹⁷⁶⁹ It is rather obvious however from the state practice throughout the twentieth century that there has been a lack of consensus on who is a terrorist and who is a legitimate freedom fighter.¹⁷⁷⁰ Nevertheless, as mentioned above, the biggest stumbling block to finalizing a universal definition of terrorism by the international community is the perennial argument that “one man’s terrorist is another man’s freedom fighter” has been a permanent feature of the debate regarding NSAGs.¹⁷⁷¹

4.7.4 Treaty law related to terrorism

The very first international instrument that concerned itself with the issue of defining ‘terrorism’ was the Convention for the Prevention and Punishment of Terrorism of 16 November 1937, adopted by the League of Nations.¹⁷⁷² As always, due to lack of consensus within the international community it was largely overlooked.¹⁷⁷³ As a result, the international community settled on a twin-track approach, namely dealing both with particular manifestation of terrorist activity and with a general condemnation of the

¹⁷⁶⁶ Jarna Petman, ‘Evil in International Law’, 5(4) *INT’L L. FORUM DROIT INT’L*, 236 (2003), p. 237.

¹⁷⁶⁷ B. Lewis, ‘Palestinians and the PLO: A Historical Approach’, *Commentary*, ABD-CLIO, 1975, p. 48.

¹⁷⁶⁸ Arendt, ‘On Revolution’, *op. cit.*, pp. 23-24.

¹⁷⁶⁹ J.J. Tierney, ‘Terror at Home: the American Revolution and Irregular Warfare’, 12 *Stan. J. Int’l Stud.* 1 1977, p. 2.

¹⁷⁷⁰ K. Graham, ‘The Security Council and Counter-Terrorism: Global and Regional Approaches to an Elusive Public Good’, *Terrorism & Political Violence* 37, 55 (2005), p. 40; Barnidge, ‘Non-State Actors and Terrorism’, *op. cit.*, p. 50.

¹⁷⁷¹ H.B. Mishra, ‘Terrorism: Threat of Peace and Harmony’, Authors Press, India, 1999, pp. 19-21.

¹⁷⁷² For the text of the Convention see Y. Alexander, M.A. Browne and A.S. Nanes (ed.), ‘Control of Terrorism: International Documents’, New York: Crane-Russak, 1979, p. 19; see B. Saul, ‘The Legal Response of the League of Nations to Terrorism’, 4 *JICJ*, 2006, p. 78.

¹⁷⁷³ *Ibid.*

phenomenon.¹⁷⁷⁴ After the creation of the UN, a school of thought emerged that shied away from definitions that fail to simultaneously address the ‘historical, economic, social, and political causes underlying resort to terrorism.’¹⁷⁷⁵ Indeed this view advanced by developing states is very much supportive of freedom fighters, which makes a basic distinction between their actions and the action of terrorists.¹⁷⁷⁶

The first concerted effort to address the issue of terrorism took place in 1972 as a result of the murder of Israeli athletes at the Munich Olympic Games, an earlier attack on an Israeli airport and murder of a Soviet diplomat in New York.¹⁷⁷⁷ The Ad Hoc Committee on Terrorism set up by the United Nations General Assembly in the first attempt since the creation of the United Nations was to find a unanimously accepted definition of terrorism.¹⁷⁷⁸ With the Security Council beset by the Cold War power politics, and under pressure from the members of the Group of 77, the General Assembly rather than defining terrorism opted for a study of ‘the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair, which cause some people to sacrifice human lives, including their own, to effect radical changes’.¹⁷⁷⁹ According to Saul ‘the title of this agenda item does not assert that all terrorist acts are caused by such factors, but implied that those factors underlie at least some terrorist acts.’¹⁷⁸⁰

During the General Assembly debates in 1970s, there was some consensus for the view especially within the non-alienated states that although terrorism is illegal in some particular cases it may be justifiable.¹⁷⁸¹ During the course of these debates some states were of the opinion that there was a fundamental difference between terrorist actions against democratic regimes where institutional means of redress existed and popular upsurge by national liberation armies in exercise of their right to self-determination against oppressive regimes.¹⁷⁸² Guillaume notes that the drafters of those early conventions which attempted to

¹⁷⁷⁴ Shaw, ‘International Law’, *op. cit.*, p. 1159; T.M. Franck & B. Lockwood, ‘Preliminary Thoughts Towards an international Convention on Terrorism’, 68 *AJIL* (1974), p. 69.

¹⁷⁷⁵ A. Cassese, ‘International Criminal Law’, in ‘International Law’ M. D. Evans (ed.), Oxford U.P., 2003, pp. 721, 750.

¹⁷⁷⁶ Barnidge, ‘Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle’, *op. cit.*, p. 18.

¹⁷⁷⁷ Saul, ‘Defining Terrorism in International Law’, *op. cit.*, p. 71.

¹⁷⁷⁸ G. Guillaume, ‘Terrorism and International Law’, 53 *ICLQ* 537 (2004), p. 539.

¹⁷⁷⁹ See United Nations General Assembly Resolution 40/61 and 42/159.

¹⁷⁸⁰ Saul, ‘Defining Terrorism in International Law’, *op. cit.*, p. 71.

¹⁷⁸¹ J. Friedrichs, ‘Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism’, *LJIL* Vol. 19, No. 1, March 2006, pp. 69-91, p. 73; see also UN Doc. A/9028 (1973): report of the Ad Hoc Committee, annex 7b.

¹⁷⁸² S.J. Rosen & R. Frank, ‘Measures against International terrorism’, in D. Carlton & C. Schaerf (ed.), ‘International Terrorism and World Society’, London: Croom Helm, 1975, p. 60-62; J. Dugard, ‘International Terrorism and the Just War’, 12 *Stanford Journal of International Studies* 21 (1977); see Algerian outspoken

combat terrorism had to do so without naming it as such.¹⁷⁸³ It is worth noting that the Western powers adopted an ambiguous attitude, in that although paying lip service to the inherent right of peoples to self-determination but at the same time maintaining that the end could never justify the means.¹⁷⁸⁴ The political problem of fighting terrorism in the West is neatly illustrated by ‘*the European Convention on the Suppression of Terrorism*’ of 1977. In its opening article it states that certain terrorist activities shall not be regarded as ‘political offences’ for extradition purposes.¹⁷⁸⁵ By doing so, the idea was to deactivate political considerations, hence, treat the so-called terrorists as common criminals.¹⁷⁸⁶ However, it has been noted that this approach of ‘de-politicization’ was not maintained with consistency, as Article 5 of the abovementioned Convention reintroduces political consideration.¹⁷⁸⁷ The Palestinian Liberation Organization (PLO) at the time featured prominently at the centre of this debate, the cause of which was being promoted very strongly by mainly Third World states.¹⁷⁸⁸ Therefore, according to Friedrichs: ‘... These regimes demanded the exemption of national liberation movements from the definition of international terrorism, and called for the inclusion of state terrorism instead; moreover, they asked that the causes of terrorism be analyzed prior to measures being taken against it.’¹⁷⁸⁹

Due to such ideological clashes in the 1970s through to the 1990s over what should be meant by terrorism, the international community was left with no alternative but to abandon an all-inclusive denunciation of terrorism and settled on proscribing and broadening extraterritorial jurisdiction over certain activities which are associated with terrorism.¹⁷⁹⁰ At the height of the concern for terrorism in 1987, the UN Security Council passed a resolution in which it condemned terrorism in the strongest terms calling upon all nations to make every possible effort to overcome the scourge of terrorism.¹⁷⁹¹ The main emphasis of this approach was

comment which makes a distinction between ‘heinous terrorism’ and ‘terrorism that was political in origin and purpose’, UN Doc. A/32/37 (28 April 1977): report of the Ad Hoc Committee, p. 14.

¹⁷⁸³ Guillaume, ‘Terrorism and International Law’, *op. cit.*, p. 539.

¹⁷⁸⁴ UN Doc. A/AC.160/I (16 May 1973); A/AC.160/I/Add.I (12 June 1973); A/AC.160/2 (22 June 1973): Observations of states and analytical study by the Secretary General.

¹⁷⁸⁵ ‘The European Convention on the Suppression of Terrorism’, 21/01/1977, reproduced in R. Higgins & M. Flory (ed.), ‘Terrorism and International Law’, Routledge, 1997, p. 306.

¹⁷⁸⁶ C. van den Wijngaert, ‘The Political Offence Exception to Extradition: the Delicate Problem of Balancing the Rights of the Individual and the International Public Order’, Kluwer Law International, 1980, pp. 134-135.

¹⁷⁸⁷ Klabbers notes that if the extradition request is politically motivated, then the state concerned is not under any obligation to extradite, Klabbers, ‘Rebel With a cause? Terrorists and Humanitarian Law’, *op. cit.*, p. 306.

¹⁷⁸⁸ L. Migliorino, ‘International Terrorism in the United Nations Debates’, *Italian Yearbook of International Law* (1976), II, 102.

¹⁷⁸⁹ J. Friedrichs, ‘Defining the International Public Enemy’, *op. cit.*, p. 78.

¹⁷⁹⁰ A. Aust, ‘Counter-Terrorism: a New Approach’, 5 *Max Planck Yearbook of United Nations Law* (2001) 285, p. 290-291.

¹⁷⁹¹ B. Saul, ‘Definition of “Terrorism” in the UN Security Council: 1885-2004’, 4(1) *Chin. JIL*, 141, (2005), p. 152.

upon the conclusion of a series of international conventions in regards to the hijacking of airplanes and abduction of diplomats as well as extending to terrorist bombings and ‘nuclear terrorism’.¹⁷⁹²

4.7.5 The end of the Cold War

The end of the Cold War and the collapse of the Soviet Empire provided the UN with a new impetus to renew its efforts to achieve a generally acceptable definition of terrorism, as well as heralding a radical change of attitude towards international terrorism.¹⁷⁹³ Therefore, the term ‘terrorism’ reappeared again under the pressure from politicians, the media and NGOs.¹⁷⁹⁴ Eventually, this culminated in a 1994 Resolution, in which the General Assembly reiterated its ‘unequivocal condemnation of all acts, methods and practices of terrorism’.¹⁷⁹⁵ Weigend observes that the most remarkable feature of this Resolution is: ‘... the absence, for the first time, of any reference to peoples ... legitimate struggle for freedom and independence’.¹⁷⁹⁶

According to an initiative at the request of the Secretary General of the UN resulting in a report produced by the High Level Panel on Threats, Challenges and Changes: ‘terrorism attacks the values that lie at the heart of the Charter of the United Nations: respect for human rights; the rule of law; rules of war that protect civilians; tolerance among peoples and nations; and the peaceful resolution of conflict.’¹⁷⁹⁷ Perez-Gonzalez opines that the reference to “rules of war that protect civilians” is a clear expression of the fact that in some cases such

¹⁷⁹² Weigend, ‘The Universal Terrorist: the International Community Grappling with a Definition’, *op. cit.*, p. 919; see e.g. Convention on Offences and Certain Other Acts Committed on Board of Aircraft of 14 September 1963 (UNTS 1969, 10106); Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970 (UNTS 1973, 12325); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 (UNTS 974, I-14118); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973 (UNTS 1035, I-15410); Convention on the Physical Protection of Nuclear Material of 26 October 1979 (UNTS 1456, I-24631); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 24 February 1988 (UNTS 1589, A-14118); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988 (UNTS 1678, I-29004); Convention on the Suppression of Terrorist Bombings of 15 December 1997 (UN Doc. A/res/52/164); Convention for the Suppression of Acts of Terrorism of 13 April 2005 (UN Doc.A/Res/59/290).

¹⁷⁹³ A. Cassese, ‘International Criminal Law’, Oxford U.P., 1st ed., 2003, p. 124; also see J. Dugard, ‘The Problem of the Definition of Terrorism in International Law’, *op. cit.*, pp. 194-195.

¹⁷⁹⁴ Guillaume, ‘Terrorism and International Law’, *op. cit.*, p. 539.

¹⁷⁹⁵ UN GA Res. 49/60 of December 1994. It is worth noting that the same definition was used two years later in GA Res. 51/210 of 17 December 1996 (‘Measures to eliminate international terrorism’).

¹⁷⁹⁶ Weigend, ‘The Universal Terrorist: the International Community Grappling with a Definition’, *op. cit.*, p. 920.

¹⁷⁹⁷ U.N. G.A. doc. A/59/565, 2 December 2004; VI, A, Para. 145 <<http://www.un.org/secureworld/report2.pdf>>.

terrorist acts take place within the confines of international, non-international armed conflict, or in situations of partial or total occupation of a territory by a state or another in which normally IHL would apply.¹⁷⁹⁸ Nevertheless, this effort did not result in articulation of a universal definition of terrorism.¹⁷⁹⁹

The approach has been followed through subsequent documents such as the High Level Panel report and ‘In Larger Freedom: Towards Development, Security and Human Rights for All’, produced by the Secretary General of the UN, in which he:

Endorses fully the High-Level Panel’s call for a definition of terrorism ... in addition to actions already proscribed by existing conventions ... intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act.¹⁸⁰⁰

4.7.6 After 11 September 2001 attacks

It has however, been argued that the attacks of 11 September 2001 upon the World Trade Centre has moved this process onto a higher level.¹⁸⁰¹ The events of 11 September 2001, resulted in the Security Council Resolution 1373 of 28 September 2001, which provided the UN to go one step further and adopt an ‘*exceptionless*’ definition of terrorism into a legally binding instrument, the Convention for the Suppression of the Financing of Terrorism.¹⁸⁰² Significantly, after reference to the acts constituting offences pursuant to earlier treaties, this Convention provides a residual definition of terrorism as:

Any other act intended to cause bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.¹⁸⁰³

¹⁷⁹⁸ Perez-Gonzalez, ‘Combating Terrorism: An International Humanitarian Law Perspective’, *op. cit.*, p. 254.

¹⁷⁹⁹ Perez-Gonzalez, *ibid.*

¹⁸⁰⁰ UN, G.A., doc. A/59/2005, 21 March 2005, III, b, para. 91; Text available at: <http://www.un.org/largerfreedom/chap3.htm>.

¹⁸⁰¹ Shaw, ‘International Law’, *op. cit.*, p. 1162.

¹⁸⁰² Weigend, ‘The Universal Terrorist: the International Community Grappling with a Definition’, *op. cit.*, p. 920; ‘The International Convention on the Suppression of the Financing of Terrorism’, adopted by the General Assembly of the United Nations according to resolution 54/109 of 9 December 1999, entered into force on 10 April 2002, 39 *ILM* 270 (2000).

¹⁸⁰³ *Ibid.*, Article 2(1) (b), p. 271.

In contrast, Article 1 of the Terrorist Bombing Convention refers neither to armed conflict nor to non-combatants or civilians. In fact, Article 19(2) unequivocally excludes ‘the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law’, this is in light of the fact that such activities are regulated by IHL.¹⁸⁰⁴ Significantly, the Terrorist Bombing Convention does not deal with the activities of NSAGs in a non-international armed conflict. Hence, according to the said Convention an individual would be guilty of an offence if she/he: ‘... unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility.’¹⁸⁰⁵

However, the former President of ICJ Guillaume says:

A distinction should be made between the victim that the terrorist seeks to harm, the target that he wishes to attain and the results he is looking to secure. Terrorism is a method of combat in which the victims are not chosen on an individual basis but are struck either at random or for symbolic effect. The goal pursued in attacking them is not to eliminate the victims themselves but to spread terror among the group to which they belong. By doing so, terrorists generally seek to compel governments or public opinion to some concession towards them, if only to consider their position more favourably.¹⁸⁰⁶

In spite of these developments in recent years there is a suggestion that the international community is divided into two camps, namely the leading Western powers such as the US and UK that would rather prefer to determine the issue of terrorism on case-by-case basis as the approach adopted in the “War on Terrorism”¹⁸⁰⁷ perfectly illustrate and states favoring the *status Quo* which would prefer to tie these powers to a legal definition of terrorism in international law presumably without relying or involvement of IHL.¹⁸⁰⁸ It is submitted that in relation to terrorism, the focus of the debate regarding NSAGs has moved onto a different

¹⁸⁰⁴ International Convention for the Suppression of Terrorist Bombings 1997, UN Doc A/RES/52/164 Annex; 37 *ILM* 249 (1997).

¹⁸⁰⁵ *Ibid*, Article 2(1).

¹⁸⁰⁶ Guillaume, ‘Terrorism and International Law’, *op. cit.*, p. 540-41.

¹⁸⁰⁷ Cassese describes the use of ‘war’ in this case as a misnomer, A. Cassese, ‘Terrorism is also Disrupting some Crucial Legal Categories of International Law’, *op. cit.*, p. 933; for a critical appraisal of “war on Terror” see G. Rona, ‘International Law Under Fire: Interesting Times for International Humanitarian Law: Challenges from ‘War on Terror’, 27 *Fletcher Forum of World Affairs* (2003) 55-70; in contrast, a forceful support for the concept of ‘war on terror’ see M.M. Ould Mohamedou, ‘Non-Linearity of Engagement: Transnational Armed Groups, International Law and Conflict between Al-Qaeda and the United States’, *Harvard Program on Humanitarian Policy and Conflict research*, <<http://www.hpcr.org>>.

¹⁸⁰⁸ J. Friedrichs, ‘Defining the International Public Enemy’, *op. cit.*, p. 69.

level. This is mainly due to the fact that many scholars and practitioners now believe that the debate regarding the doctrine of self-determination as the process of decolonization has run its course.¹⁸⁰⁹ Additionally, in the post-9/11 era, regarding the issue of terrorism, a number of regional instruments condemning terrorism have also been adopted.¹⁸¹⁰

5.7.7 Terrorism in IHL: a specific context & meaning

Since the launching of the ‘war on terror’, many states engaged in internal armed conflict have labelled NSAGs challenging their legitimacy as ‘terrorist’.¹⁸¹¹ According to Cassese: ‘in a matter of days, practically all states, ... have come to assimilate a terrorist attack by a terrorist organization to an armed aggression by a state, entitling the victim state to individual self-defence and third states to act in collective self-defence.’¹⁸¹² From the outset it has to be emphasised that IHL specifically prohibits ‘measures of terrorism’ and ‘acts of terrorism’, specifically when it is taking place during the course of hostilities and committed on the territory of one of the states affected by the conflict, the primary purpose of which is to spread terror in the civilian population.¹⁸¹³ In regards to NSAGs, it is in internal armed conflicts that a delicate balance has to be struck between IHL and anti-terrorist measures. Pejic notes: ‘While acts of violence against military objectives in internal armed conflicts remain subject to domestic criminal law, the tendency to designate them as ‘terrorist’

¹⁸⁰⁹ According to Tomuschat, ‘Generally international lawyers proceeded from the assumption that since the end of the decolonization process the surface of the globe was covered by a given number of entities which almost all bore the characteristics of a sovereign state ... with the exception of small corrections here and there history seemed to have come to its irreversible end’. C. Tomuschat, ‘Self-Determination in a Post-Colonial World’, in *Modern Law of Self-Determination*, C. Tomuschat (ed.), Martinus Nijhoff Publishers, 1st ed., 1993, 1-20, p. 5.

¹⁸¹⁰ The Council of Europe Convention on the Prevention of Terrorism, 2005; the European Union Framework Decision on Terrorism, 2002; the South Asian Association for Regional Cooperation Regional Convention on Suppression of Terrorism, 1987 and Additional Protocol of 2005; the Arab Convention of the Islamic Conference on Combating International Terrorism, 1999; the Commonwealth of Independent States Treaty on Cooperation in Combating Terrorism, 1999; the African Union Convention on the Prevention and Combating Terrorism, 1999 and Protocol of 2005; for the purpose of cooperation and extradition, ‘terrorism’ is defined in Article 1 of 4 June 1999 Commonwealth of Independent States (CIS) Treaty on Cooperation in Combating Terrorism; the ASEAN Convention on Counter Terrorism, 2007, and the Organization of American States Inter-American Convention against Terrorism, 2002. In addition, the Organization on Security and Co-operation in Europe adopted a Ministerial Declaration and Plan of Action on Combating Terrorism in 2001.

¹⁸¹¹ Bianchi & Naqvi, ‘International Humanitarian law & Terrorism’, *op. cit.*, p. 15.

¹⁸¹² A. Cassese, ‘Terrorism is also Disrupting some crucial Legal Categories’, (2001) 12 *EJIL* 993.

¹⁸¹³ Fourth Geneva Convention, Art 33; Additional Protocol II, Article 4(2) (d); see also M. Sassoli, ‘International Humanitarian Law and Terrorism’, in A. Wilkinson & A. Steward, ‘Contemporary Research on Terrorism’, Aberdeen U.P., 1987, pp. 466-474, p. 470-72; Sassoli, ‘Terrorism and War’, *op. cit.*, p. 967; Pejic, ‘Terrorist Acts and Groups: A Role for International Law?’, *op. cit.*, p.74;

completely undermines whatever incentive armed groups have to respect international humanitarian law.’¹⁸¹⁴

IHL has a context-dependent, specific meaning of the term “terrorism” which is based on the principle of distinction between combatants and civilians, particularly concerned with protecting civilians.¹⁸¹⁵ Once it has been established that a situation of armed conflict exists, it is rather pointless to designate atrocities directed against civilians and civilian targets as ‘terrorist’ because such acts already amount to war crimes under international criminal law.¹⁸¹⁶ In situations of armed conflict, IHL does not provide a definition of terrorism,¹⁸¹⁷ whether in international or non-international armed conflicts, but it proscribes most acts against civilian population and targets committed in armed conflict that generally be considered ‘terrorist’ if committed in peacetime.¹⁸¹⁸ As far as IHL is concerned, the meaning of terrorism in situations of armed conflict is more limited than many definitions of terrorism provided in other contexts.¹⁸¹⁹ Hence, ‘the IHL sense of “terrorism” is not premised on NSAG using explosives, hijacking aircraft, or financing groups that do so. As the IHL only applies in international armed conflict, belligerent occupation, or non-international armed conflict, it follows that terrorism in the IHL sense is restricted to these situations.’¹⁸²⁰ The IHL establishes sufficiently rigorous and clear rules of conduct for identifying and condemning terrorism as war crimes, condemning the use of terrorist tactics has also a solid base in customary international law, specifically prohibiting excessive damage against those who are not participating in the hostilities.¹⁸²¹ Article 33 of Geneva Convention IV 1949 contains the very term ‘terrorism’ (in relation to protection of civilians in international armed conflicts) and provides that ‘collective penalties and likewise all measures of intimidation or of terrorism is prohibited’ against civilians and persons no longer taking part in the hostilities.¹⁸²² In the case of non-international armed conflicts Additional Protocol II in Article 4(2)(d) in the shape of fundamental guarantees simply extends this prohibition to such

¹⁸¹⁴ Pejic, ‘Terrorist Acts and Groups: A Role for International Law?’, *op. cit.*, p.74.

¹⁸¹⁵ E. Stubbins-Bates, ‘Terrorism and International Law’, *op. cit.*, p. 33.

¹⁸¹⁶ Pejic, ‘Terrorist Acts and Groups: A Role for International Law?’, *op. cit.*, p.74.

¹⁸¹⁷ The meaning of ‘terrorism’ in Article 33(1) of 1949 Fourth Geneva Convention is not defined and there was little recorded debate in the Diplomatic Conference; Saul, ‘Defining Terrorism in International Law’, *op. cit.*, p. 291.

¹⁸¹⁸ Pejic, ‘Terrorist Acts and Groups: A Role for International Law?’, *op. cit.*, p.73.

¹⁸¹⁹ Saul, ‘Defining Terrorism in International Law’, *op. cit.*, p. 297.

¹⁸²⁰ Stubbins-Bates, ‘Terrorism and International Law’, *op. cit.*, p. 34.

¹⁸²¹ Perez-Gonzalez, ‘Combating Terrorism: An International Humanitarian Law Perspective’, *op. cit.*, p. 256.

¹⁸²² There is no definition provided in Article 33, nor was there any comprehensive debate in the Diplomatic conference; Kalshoven, ‘Guerrilla and Terrorism in Internal Armed Conflict’, *op. cit.*, p. 74; see ICRC Report, ‘Terrorism and International Law: Challenges and Responses: the Complementary Nature of Human Rights Law, international Humanitarian Law and Refugee Law’, Geneva, 2002, p. 4.

armed conflicts (specifically concerning civilians and *hors de combat*).¹⁸²³ It provides that ‘acts of terrorism’ against civilians and non-combatants ‘are and shall remain prohibited at any time and in any place whatsoever.’ IHL also contains provisions that although the word ‘terrorism’ is not mentioned proscribes such acts, depending on the intent, nationality of the perpetrator and victims and other such considerations, may be prohibited by one of the treaties against terrorism, for instance, the prohibition of acts of violence in Common Article 3 directed against ‘persons taking no active part in hostilities’ would apply to some acts of terrorism.¹⁸²⁴ In terms of prohibition of ‘spreading terror among civilians’, the Additional Protocol I&II provide a limited concept of terrorism in armed conflict elucidated in Article 51(2) of Protocol I, and Article 13(2) of Protocol II. Both Articles are identical in prohibiting ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’.¹⁸²⁵ The abovementioned provisions extend the protection provided under the Fourth Geneva Convention to civilians embroiled in international armed conflict (including wars of national liberation), as well as civilians in non-international armed conflicts.¹⁸²⁶ However, in both cases the most crucial consideration is the contentious issue of determining the threshold in the case of low-intensity, non-state violence (such as terrorism) which has to be reached to trigger the application of IHL.¹⁸²⁷ Furthermore, Article 13(1) of the same Protocol translates this principle to more specific rules: ‘The Civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited’. According to Kalshoven, ‘the language of the second sentence is far more specific than the terse reference to ‘acts of terrorism’ in Article 4(2). In effect, the sentence defines terrorism in the context of the protection of the civilian populations.’¹⁸²⁸

Therefore, in both international and non-international armed conflicts, civilians shall not be the object of attack, acts or threats of violence, the primary purpose of which is to spread

¹⁸²³ 1977 Additional Protocol II, Article 4(2)(h), is modeled on Article 33 of the Fourth Geneva Conventions of 1949; Sandoz *et al.*, ‘Commentary on Additional Protocols’, *op. cit.*, para. 4538; Kalshoven, ‘Guerrilla and Terrorism in Internal Armed Conflict’, *op. cit.*, p. 73-74.

¹⁸²⁴ D. O’Donnell, ‘International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces’, *IRRC*, Vol. 88, No. 864, December 2006, 863.

¹⁸²⁵ The novel provision in Article 1(3) of Protocol I also extends ‘to all cases of partial or total occupation of the territory of a High Contracting Party, even if the armed occupation meets with no resistance’; see generally Gasser, ‘International Humanitarian Law, the Prohibition of Terrorist Acts, and the Fight against Terrorism’ in IPA (ed.), ‘Responding to Terrorism (IPA), New York, 2002).

¹⁸²⁶ This was reiterated in the Declaration of General Rules in Non-International Armed Conflicts, 14th Roundtable on Humanitarian Law, San Remo, 1989, rule 3 (1989) 10 *IRRC* 278, p. 404.

¹⁸²⁷ UN Sub-Commission on the Protection and promotion of Human Rights (53rd Session), Terrorism and Human Rights: Progress Report by Special Rapporteur Ms. K. Koufa, 27 June 2001, UN Doc E/CN.4/Sub.2/2001/31, pp. 19-22; Saul, ‘Defining Terrorism in International Law’, *op. cit.*, p. 293.

¹⁸²⁸ Kalshoven, ‘Guerrilla and Terrorism in Internal Armed Conflict’, *op. cit.*, p. 75-76.

terror among the civilian population are prohibited.¹⁸²⁹ According to the ICRC Commentary, violent acts in the course of an armed conflict inevitably, ‘almost always give rise to some degree of terror among the population and sometimes also among the armed forces’, and the fact that ‘attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender’.¹⁸³⁰ The ICRC Commentary goes on to say that by the virtue of Article 4(2)(d) of Additional Protocol II the distinction between combatants and civilians does exist implicitly in IHL of non-international armed conflict.¹⁸³¹ The decisive element according to Gasser in identical prohibitions in Protocol I and II is the primary purpose to spread terror among the civilian population.¹⁸³² This is supported by the general trend in the ICRC Study on Customary International Humanitarian Law as well as some of the ICTY case-law which has applied the same approach to armed conflict regardless of whether an international or non-international armed conflict.¹⁸³³

Based upon this the ICTY in the case of *Galic*, convicted the commander of the Bosnian Serb forces for the siege of Sarajevo from 1992 to 1995, for war crimes.¹⁸³⁴ The Trial Chamber held that a campaign of deliberately targeting besieged civilians in Sarajevo amounted to terrorism under Article 51(2), Additional Protocol I.¹⁸³⁵ According to the Trial Chamber, terror was accepted to mean extreme fear, and provoking such fear had to be specifically intended results.¹⁸³⁶ This approach is very much supported by the subsequent scholarly writings that have stated that the Serbian violence in Croatia (1991), Bosnia (1992), and Kosovo (1998-99), which included “ethnic cleansing” and “mass expulsion” of the civilian population, amounted to terrorism.¹⁸³⁷

¹⁸²⁹ See Article 51(2) of Additional Protocol I, Article 13(2) of Additional Protocol II and a corresponding rule of customary IHL (see Rule 1&2 of the ICRC Study, vol. I), Henckaerts, *et al.*, ‘Customary International Humanitarian Law: Rules’, *op. cit.*, pp. 3-11.

¹⁸³⁰ Sandoz, *et al.*, ‘Commentary on Additional Protocols’, *op. cit.*, para. 1940.

¹⁸³¹ *Ibid.*

¹⁸³² H. Gasser, ‘Protection of the Civilian Population’ in D. Fleck (ed.), ‘the Handbook of Humanitarian Law in Armed Conflict’, *op. cit.*, 209, p. 219.

¹⁸³³ Henckaerts, *et al.*, ‘Customary International Humanitarian Law: Rules’, *op. cit.*; *Prosecutor v Tadic*, 2 October, *op. cit.*

¹⁸³⁴ Judgement, *Galić* (IT-98-29-T), Trial Chamber, 5 December 2003, para. 91-137 and 208-579; see also D. Kravetz, ‘The Protection of Civilians in War: The ICTY’s *Galic* Case’ (2004) 17 *LJIL* 521.

¹⁸³⁵ *Ibid.*, para. 27 & para. 133.

¹⁸³⁶ *Ibid.*, para. 136-137.

¹⁸³⁷ S. Oeter, ‘Means and Methods of Combat’, in D. Fleck (ed.), ‘the Handbook of Humanitarian Law in Armed Conflict’, *op. cit.*, 105, pp. 169-180; Green, ‘the Contemporary Law of Armed Conflict’, *op. cit.*, p. 351; Helsinki Watch, ‘War Crimes in Bosnia Herzegovina’, Vol. II, New York, 1993, p. 11; The Organization for Security and Co-operation in Europe (OSCE), Kosovo/Kosova, as seen as told: An analysis of the human rights findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999 (OSCE, Warsaw, 1999), text available at: <http://www.osce.org/item/17755.html>.

As noted above, there is no ‘combatant privilege in non-international armed conflict notwithstanding the fact that members of NSAGs may be killed,¹⁸³⁸ there is no assumption that they fight lawfully.¹⁸³⁹ Therefore, attacks by members of NSAGs on armed forces (rather than non-combatants) can be permitted under IHL in non-international armed conflicts, although they may be criminal acts under the penal law of the state concerned.¹⁸⁴⁰

Amnesty International in its report on the armed conflict between Israel and the southern Lebanese NSAG Hezbollah in 2006 considered the concepts of terrorism and spreading terror amongst civilian population. It suggested that the practice of leaflet dropping by the Israeli Defence Forces informing the civilian population of impending air strikes may have amounted to ‘spreading terror among the civilian population’ rather than a precaution taken to avoid civilian casualties.’¹⁸⁴¹ Some scholars have expressed reservation regarding this practice by Israel since it is all well and good to inform the civilian population of the imminent air strikes, but more often than not the most vulnerable section of the civilian populations such as the old and infirmed are not able to escape the combat zone.¹⁸⁴² In the opinion of the present author not only such a practice does not alleviate the suffering of civilians, and hence does not discharge the obligation to take precaution to prevent harm to civilians.¹⁸⁴³ Furthermore, it has been noticed elsewhere that the choice of particular weapons and ammunition could also amount to evidence of spreading terror amongst the civilian population. The Fact-Finding Mission established by the UN Human Rights Council (HRC) to look into violations of IHRL and IHL in the Operation Cast Lead, the armed conflict between the Israeli Defence Forces and Hamas in the Gaza Strip, from 27 December 2008 to 18 January 2009, stated that the use of *Flechette* shells by Israel was ‘not only an attack intended to kill but also to spread terror among the civilian population, given the nature of the weapons used.’¹⁸⁴⁴ By the same token the Report also stated unequivocally that the primary purpose of shelling civilian communities in Israel by Hamas was to ‘spread terror amongst

¹⁸³⁸ Civilians lose their immunity if and for the time that “they take direct part in hostilities” (unprotected civilians, Article 51(3) Protocol I); see also The ICRC, Report of the Second Expert Meeting on the Notion of Direct Participation in Hostilities, The Hague, 25-26 October 2004, p. 3.

¹⁸³⁹ Stubbins-Bates, ‘Terrorism and International Law’, *op. cit.*, p. 36.

¹⁸⁴⁰ *Ibid.*

¹⁸⁴¹ Amnesty International USA, ‘Israel/Lebanon: Israel and Hezbollah must Spare Civilians: Obligations under International Humanitarian Law of the Parties to the Conflict in Israel and Lebanon’, 25 July 2006, (AI Index: MDE 15/070/2006).

¹⁸⁴² Stubbins-Bates, ‘Terrorism and International Law’, *op. cit.*, p. 36.

¹⁸⁴³ Henckaerts, *et al.*, ‘Customary International Humanitarian Law: Rules’, *op. cit.*, Rules 23-24.

¹⁸⁴⁴ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc A/HRC/12/48, 15 September 2009 (Fact-Finding Mission on the Gaza Conflict), endorsed by General Assembly Resolution A/Res/64/10, 5 November 2009 and Human Rights Council Resolution A/HRC/Res/S-12/1, 16 October 2009, para. 880.

the Israeli civilian population, in violation of international law.’¹⁸⁴⁵ It has to be noted that the aforementioned Report manages to strike a balance between the obligations by a state and a NSAG in treaty law regarding IHL’s specific concept of terrorism in an armed conflict which prohibits violation of the principle of distinction.¹⁸⁴⁶

4.8 IHRL and counter-terrorism measures

Nonetheless, if a state was to deny the existence of an armed conflict in relation to a NSAG on its territory, then the situation comes under law enforcement paradigm ruled by IHRL.¹⁸⁴⁷ Moreover, the state concerned cannot simply claim that it is an internal matter and does not concern international law. In such a case, IHRL and national constitutional guarantees will be applied to the situation commonly referred to by states as counter-terrorist operations.¹⁸⁴⁸ IHRL in particular regulates state policies in counter-terrorism both in armed conflict and during periods of civil strife.¹⁸⁴⁹ As result, it obliges states to respect and ensure general and specific civil and political rights as well as to respect protect, and fulfill economic, social, and cultural rights. As a result of these instruments states are bound by IHRL to act with due diligence to prevent violations of the right to life by NSAGs and accordingly regulate their counter-terrorism policies.¹⁸⁵⁰ However, bearing the responsibility of protecting their citizens does not give the states an excuse for human rights violations which may ultimately tantamount to crimes against humanity.¹⁸⁵¹

¹⁸⁴⁵ The Report based its reasoning on the lack of precision in Hamas’s weaponry, Fact-Finding Mission on the Gaza Conflict, para. 108.

¹⁸⁴⁶ Stubbins-Bates, ‘Terrorism and International Law’, *op. cit.*, p. 37.

¹⁸⁴⁷ T. Pfanner, ‘Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action’, *IRRC*, vol. 87, No. 957, March 2006, pp. 149-174; p. 165.

¹⁸⁴⁸ P. Alston et al., ‘International Human Rights Law in Context: Law, Politics, Morals’, Oxford U.P., 3rd ed., 2007, P. 375.

¹⁸⁴⁹ In relation to the armed conflict between Hezbollah and Israel, Lebanon did not declare a state of emergency according to Article 4 of the International Covenant for Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); however, it proclaimed a national state of emergency on 12 July 2006. A stark example is the state of Israel which remains under a state of emergency proclaimed on 19 May 1948, four days after its Declaration of Establishment (UN Doc CCPR/C/ISR/2001/2 (4 December 2001, para. 71); On ratifying the ICCPR, it made a declaration regarding the existence of this state of emergency and attached a reservation to Article 9 (Liberty and Security of Person), UN Doc A/58/40 (1 November 2003) vol. I, 64, para 12. The Human Rights Committee has expressed concern that the Israeli policies related to the state of emergency appear to have unofficially derogated from additional provisions of ICCPR; Stubbins-Bates, ‘Terrorism and International Law’, *op. cit.*, p. 77.

¹⁸⁵⁰ Stubbins-Bates, ‘Terrorism and International Law’, *op. cit.*, p. 78.

¹⁸⁵¹ UN High Commissioner for Human Rights, Report of the HCHR and follow up to the world conference on Human Rights, E/CN.4/2002/18, 27 February 2002, para 2.

4.8.1 States of emergency and anti-terrorism

In some instances states choose to respond to threats to their national security by declaring a state of emergency, according to which they could derogate from certain laws, or temporarily suspended, in times of ‘war or public emergency threatening the life of the nation’. In recent times, terrorist attacks have prompted states to declare that state of emergency, as in the aftermath of 11 September attacks.¹⁸⁵² The US Government proclaimed state of emergency although no formal measure to derogate from UN International Convention on Civil and Political Rights (ICCPR) or any human rights treaty was made.¹⁸⁵³

Gross and Ni Aoláin, describe the mechanism of derogation as ‘the legally mandated authority of states to allow suspension of certain individual rights in exceptional circumstances of emergency of war.’¹⁸⁵⁴ Most major international human rights treaties have some form of derogation provision, with the exception of the African Charter of Human and Peoples Rights (ACHPR). the other two major regional treaties, the European Convention on Human rights (ECHR)¹⁸⁵⁵ and the American Convention on Human Rights (ACHR),¹⁸⁵⁶ both of which permit derogations, as does the ICCPR. Indeed, there are similarities between the aforementioned derogation articles. Article 4(1) of ICCPR states:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take such measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.¹⁸⁵⁷

¹⁸⁵² President G.W. Bush, ‘Declaration of National Emergency by Reason of Certain Terrorist Attacks’ (14 September 2001), www.Whitehouse.gov/news/release/2001/09/20010914-4.html.

¹⁸⁵³ Bianchi & Naqvi, ‘International Humanitarian Law and Terrorism’, *op. cit.*, p. 42.

¹⁸⁵⁴ O. Gross and F. Ni Aoláin, ‘Law in Times of Crisis’, *op. cit.*, p. 257.

¹⁸⁵⁵ [European] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR) Article 15.

¹⁸⁵⁶ American Convention on Human Rights; Packed of San Jose, Costa Rica’ adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 144 (ACHR) Article 27. The ACHR refers to a threat to ‘the independence or security of a state party’ rather than to the life of the nation.

¹⁸⁵⁷ Measures adopted by states pursuant to permitted derogations must be proportionate: they must be limited ‘to the extent strictly required by the exigencies of the situation’; they must be consistent with a state’s other international law obligations; under the ICCPR and the American Convention on Human Rights (ACHR), measures taken pursuant to derogations must not discriminate on several enumerated prohibited grounds; the state of emergency must be officially proclaimed, and the notice of derogation deposited with the UN Secretary General.

There are four principles regulating the state of emergency denoted in major human rights instruments; namely, the scope of the notion of state of emergency; the proportionality test to assess derogation; non-derogable rights and procedural obligations.¹⁸⁵⁸ It has to be emphasised that derogations should not be the main basis of a state's anti-terrorism policies and they are rarely used in Europe with the exception of the United Kingdom derogating from Article 5 (1)(f) of ECHR, the right to liberty and security from 2001-2004 being a noteworthy example.¹⁸⁵⁹

4.8.2 The scope of the notion of state of emergency

There is controversy in relation to the scope of the notion of state of emergency, as to which body or institution has the authority to a situation of emergency.¹⁸⁶⁰ The monitoring body of ICCPR, the Human Rights Committee has expressed reservation regarding the erroneous nature of some declarations by states that do not appear to amount to a 'public emergency that do threaten the life of the nation,' falling short of articulating what conditions amount to the existence of state of emergency.¹⁸⁶¹

In *Lawless v Ireland* the European Court of Human Rights defined it as: 'an exceptional situation of crisis or emergency which affects the whole of the population and constitutes a threat to the organised life of the community of which the state is composed'.¹⁸⁶² The danger must be in a way that the normal measures permitted by the Convention are proven

¹⁸⁵⁸ Bianchi & Naqvi, 'International Humanitarian Law & Terrorism', *op. cit.*, p. 43.

¹⁸⁵⁹ Declaration contained in a *note verbale* from the Permanent Representative of the United Kingdom to the Council of Europe, 18 December 2001; see also *A and Others v Secretary of State for the Home Department*[2004] UKHL 56.

¹⁸⁶⁰ Bianchi & Naqvi, 'International Humanitarian Law & Terrorism', *op. cit.*, p. 44.

¹⁸⁶¹ See, United republic of Tanzania (28 December 1992) UN Doc CCPR/C/79/Add. 12, para 7; Dominican Republic (5 May 1993) UN Doc CCPR/C/79/Add. 18, para 4; United Kingdom of Great Britain & Northern Ireland (27 July 1995) UN Doc CCPR/C/79/Add. 55, para 23; Peru (25 July 1996) UN Doc CCPR/C/79/Add. 67, para 11; Bolivia (5 May 1997) UN Doc CCPR/C/79/Add. 74, para 14; Colombia (3 May 1997) UN Doc CCPR/C/79/Add. 76, para 25; Lebanon (5 May 1997) UN Doc CCPR/C/79/Add. 78, para 10; Uruguay (1998) UN Doc CCPR/C/79/Add. 90, para 8; Israel (18 August 1998) UN Doc CCPR/C/79/Add. 93, para 11. In regards to Israel it is noted that in its third report (21 November 2008) UN Doc CCPR/C/ISR/3, it underscored its attempts to bring to an end the state of emergency (paras 157-62). In the opinion of the HRC in its List of Issues to be discussed with Israel (17 November 2009) UN Doc CCPR/C/ISR/Q/3, urged that state to specify in detail the content and timeframe for bringing to completion 'the joint programme to complete the needed legislative procedures required ... to end the state of emergency' (3).

¹⁸⁶² In this case, the court held, that the existence of the public emergency construed by the Irish government was 'reasonably deduced'. The Irish Government relied on three important factors, namely: the existence of the Irish Republican Army (IRA); which was operating outside the territory of the state; and the steady and alarming increase in the activities of the aforementioned organization running up to the period before the emergency was declared. *Lawless v Ireland*, Judgments of 14 November 1960, 1 EHRR 15 (para 28).

inadequate to deal with the situation.¹⁸⁶³ The Lawless test sets a high threshold for a state of emergency, holding that states require tangible evidence of large-scale threat to their constitutional order. The Court extensively deliberated the conditions that would qualify as amounting to a state of emergency threatening the life of the nation, however, it concluded: ‘That a state of emergency was a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the state in question.’¹⁸⁶⁴

In contrast, in an earlier case the European Commission of Human Rights came to the view that the test in Art. 15 had not been satisfied,¹⁸⁶⁵ despite the fact that the state had been given the benefit of the margin of appreciation.¹⁸⁶⁶ This case concerned applications brought by a number of Scandinavian countries against the regime set up by the Greek colonels in 1967. The Commission held that the *Greek case* was different in nature, insofar as, the respondent state’s government seized power through a military coup d’etat on 21 April 1967 and subsequently suspended parts of the constitution and invoked Art 15 of the Convention.¹⁸⁶⁷ The Commission considered that the burden rested upon the respondent state is meant to show that the conditions justifying the measures of derogation through Art 15 had been and continued to be met.¹⁸⁶⁸ The Commission considered three elements: the threats of a communist takeover; the crisis regarding the constitutional government; and the breakdown of public order in Greece.¹⁸⁶⁹ In this case the Commission came to the conclusion that the respondent state had not satisfied the requirement that a public emergency was threatening the life of the Greek nation at the time of the military take over.¹⁸⁷⁰

¹⁸⁶³ In the Greek case, the European Commission of Human Rights established that there ought to be four characteristics in order a public emergency is considered as threatening the life of the nation: (i) it must be actual and imminent; (ii) its effects needs to involve the whole nation; (iii) the continuance of the organized life of the community must be threatened; (iv) the danger must be exceptional. The Greek case, (App no 3321/67; 3322/67; 3323/67; 3344/67), Commission’s Report of 5 November 1969, 12 *Yearbook of ECHR*, paras. 152-154.

¹⁸⁶⁴ Some of the five minority members of the Commission proposed an even more rigorous reading of the concept of “public emergency” see e.g. the dissenting opinion of Commission member Susterhenn that ‘public emergency’ must be construed as ‘tantamount to war’ or as analogous to circumstances of war. Ibid, p. 56.

¹⁸⁶⁵ Article 15(1) provides:

‘In time of war or other public emergency threatening the life of the nation any high contracting party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation, provided that such measure are not inconsistent with its other obligations under international law’.

¹⁸⁶⁶ Generally see Y. Arai-Takahashi, ‘the Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of ECHR’, Intersentia Publishers, 2002, P. 176.

¹⁸⁶⁷ *Greek case, op. cit*, para 32.

¹⁸⁶⁸ Ibid, para 72.

¹⁸⁶⁹ Ibid, para 45.

¹⁸⁷⁰ The Commission adopted a different approach to the court in regard to Art 15, the Commission, while referring to the Margin of appreciation, stated that it was more concerned; whether such an emergency existed in

Nonetheless, in the case of *Ireland v United Kingdom*¹⁸⁷¹ both the Court and the Commission were in no doubt that the public emergency threatening the whole of nation was a reality based on the terrorist activities of the Irish republican Army (IRA). The Court adopted the application of ‘margin of appreciation’ doctrine, in which the Court allowed a wide ‘margin of appreciation’ to the national authorities in deciding ‘both on the presence of such an emergency and on the nature and scope of derogation necessary to avert it.’¹⁸⁷² This was in spite of the fact that, neither of the parties at the time, were able to point out the fact that, the threat was only limited to a particular part of the territory of the United Kingdom. This approach was based on the rationale that the declaration of a state of emergency was the main prerogative of governments which in turn have the main responsibility of protecting ‘the life of the nation’.¹⁸⁷³ Consequently, by reason of their ‘direct and continuance contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.’¹⁸⁷⁴ The issue of derogating in times of a state of emergency was dealt with in the House of Lords decision of *A and Others v Secretary of State for the Home Department* (2004).¹⁸⁷⁵ Having reviewed the case-law of the European Court of Human Rights in this regard, the majority Law Lords accepted the British Government’s declaration as to existence of the public emergency based on the principle of ‘demarcation of functions or ... “relative institutional competence”’.¹⁸⁷⁶ However, Lord Hoffman, in his dissenting opinion expressed the view that the terrorist threat posed was rather negligible than to require a declaration of a state of emergency, since ‘terrorist violence, as serious as it is, does not threaten our institutions of government or our existence as a civil community’.¹⁸⁷⁷

The current position of the Court is set out on the case of *Aksoy*¹⁸⁷⁸, where it considered the public emergency issue threatening the life of the nation and places the onus on each contracting party to assess what constitutes a public emergency and what measures to take to

fact, than merely considering the Greek government to be able to provide sufficient reason to believe that public emergency existed.

¹⁸⁷¹ *Ireland v United Kingdom* (App no 5310/71) (1978) 2 EHRR 25; S. Marks Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights, 15 *Oxford JLS* 69 (1995) 72, p. 81.

¹⁸⁷² *Ibid*, para 207.

¹⁸⁷³ Bianchi & Naqvi, ‘International Humanitarian Law & Terrorism’, *op. cit.*, p. 46.

¹⁸⁷⁴ *Ireland v United Kingdom*, *op. cit.*, para 207.

¹⁸⁷⁵ *A (FC) et al (FC) (Appellants) v Secretary of State for the Home Department* [2004] UKHL 56.

¹⁸⁷⁶ *Ibid*, para 29, per Lord Bingham.

¹⁸⁷⁷ *Ibid*, para 96, per Lord Hoffman.

¹⁸⁷⁸ *Aksoy v Turkey*, app. No. 21987/93, 79-A *Eur. Comm’n H.r. Dec. & Rep.* 60 (1994).

deal with it. So a wide margin of appreciation should be left to national authorities.¹⁸⁷⁹ Some observers are of the opinion that ‘where there is an organised campaign of violence resulting in death at whatever low level among the security forces and civilians it is now hard to see how the Strasbourg authorities could avoid confirming a state’s claim that there is a public emergency within Article 15.’¹⁸⁸⁰ Furthermore, in its General Comment on states of emergency, which specifically deals with Article 4 of the ICCPR, the HRC reiterated the need for states to consider if declaring a state of emergency outside the situation of an armed conflict is absolutely necessary.¹⁸⁸¹

4.8.3 The proportionality of derogation

The second precondition for a valid derogation requires that measures derogating from government obligations under the Convention must be proportionate and must be ‘strictly required by the exigencies of the situation’.¹⁸⁸² The Human Rights Committee noted in its General Comment on states of emergency that ‘the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation.’¹⁸⁸³ In the *Greek* case the European Commission of Human Rights was not satisfied that public emergency existed and the measures taken went beyond what the situation required.¹⁸⁸⁴ In 1960, the Court followed the opinion of the commission in the *Lawless* case that detention without trial was justified under Article 15, not only were they satisfied by the measures required according to the exigencies of the situation but also pointed to a number of safeguards designed to prevent abuses.¹⁸⁸⁵ The Court in *Ireland v United Kingdom*, placed considerable emphasis on the margin of appreciation to be accorded to the state. The Court was of the opinion that the system of extra

¹⁸⁷⁹ In regards to the wide margin of appreciation, the Convention organs have generally been satisfied if a respondent government has shown some plausible basis for believing that the derogatory measures were necessary.

¹⁸⁸⁰ Harris, O’Brian and Warbrick, ‘Law of the European Convention on Human Rights’, 1995, p439.

¹⁸⁸¹ According to General Comment no 29, ‘if States parties consider invoking article 4 in other situations than armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.’ UN Human Rights Committee, General Comment no 29, States of Emergency (Article 4), ICCPR/C/21/Rev. 1/Add. 11, 31 August 2001, para 3.

¹⁸⁸² ICCPR, Art. 4; ECHR, Art. 15; IACHR, Art 27.

¹⁸⁸³ HRC, General Comment no 29, *op. cit.*, para 4.

¹⁸⁸⁴ This was in spite the fact that the Greek Communist Party had begun to prepare for armed insurrection in 1966. Communists had assembled weapons and were poised to seize power. Since then the attitude of the Convention organs have changed somewhat. For the political background see J. Becket, ‘The Greek Case before the European Human Rights Commission’, 1 (1970-71) *Human Rights Law Journal* 91.

¹⁸⁸⁵ *Lawless v Ireland*, Judgment of I July 1961, Series A No.2; (1979-80) 1 *EHRR* 13.

judicial deprivation of liberty was justified by the circumstances perceived by the United Kingdom between 1971 and 1975.¹⁸⁸⁶ In contrast, it could be argued that in the case of *Brannigan and McBride*¹⁸⁸⁷ the Court showed a greater willingness to question the safeguards, which the state puts in place for suspension of rights required by the Convention provision in respect of which the derogation is filed. This tougher stand by the Court is supported by its approach in the *Aksoy* case, in which it declined to accept that the situation had required the suspects to be held for 14 days without judicial intervention and noting that the Turkish government had failed to give any reason why judicial intervention was impracticable. In the *Lawless* case, the Court attached importance to the provision of safeguards against abuse, or excessive use of emergency powers and evidently adopted a much tougher stance to the issue.¹⁸⁸⁸ The European Court ruled that Turkey was entitled to derogation from Article 5 of ECHR, which deals with the right to liberty and security of person, due to terrorism in the south-east (the Kurdish province), but did not justify the holding of the applicant in detention for the period of 14 days, without judicial control, access to relatives and doctors simply on suspicion of involvement in terrorist offences.¹⁸⁸⁹ The Court also went on to say that the Turkish government had failed to give “detailed reasons” justifying the action. According to HRC:

... The obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers ... this condition requires that states parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. If states purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation.¹⁸⁹⁰

¹⁸⁸⁶ *Ireland v United Kingdom*, Judgment of 18 January 1978, Series A No. 25; (1979-80) 2 EHRR 25.

¹⁸⁸⁷ *Brannigan and McBride v United Kingdom*, Judgement of 18 December 1996; (1997) 23 EHRR 533.

¹⁸⁸⁸ This has been reiterated in *Aksoy* case, which the Court noted, ‘It is for the court to rule whether, inter alia, the states have gone beyond the ‘extent strictly required by the exigencies’ of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and circumstances leading to, and duration of, the emergency situation’. *Aksoy v Turkey*, app. No. 21987/93, Judgement of 18 December 1996; 23 EHRR 533, para. 68.

¹⁸⁸⁹ *Aksoy v Turkey* (1996) 23 EHRR 533.

¹⁸⁹⁰ Human Right Committee, General Comment 29, *op. cit.*, para. 4.

4.8.4 Non-derogable rights

The third requirement of the state of emergency regime, concerns such rights that even in times of a state of emergency cannot be derogated upon. The ECHR, compared to other regional human rights instruments, provides the most limited list of such guaranteed rights, namely, the right to life (with the exception of deaths resulting from lawful acts of war), freedom from torture, slavery and protection against retrospective criminal penalties.¹⁸⁹¹ Additionally, the ICCPR guarantees the right to recognition as a person before the law, the right to freedom of conscience and religion and the right not to be incarcerated merely on grounds of inability to fulfil a contractual obligation.¹⁸⁹² However, the ACHR provides the most comprehensive list of non-derogable rights: rights of the family, right to a name, rights of the child, right to nationality, right to participate in government and the judicial guarantees essential for the protection of such rights.¹⁸⁹³ Although national and international courts have been rather reluctant to question the existence of a state of emergency declared by states, but they have rather been forthright in upholding the status of non-derogable rights.¹⁸⁹⁴ It has been noted elsewhere that ‘... both the European and American Courts of Human Rights have rejected arguments from states that killing by state forces or the use of force against suspects are in any way justifiable because of a situation of war or the threat of terrorism.’¹⁸⁹⁵ However, in the context of conflict and emergencies, states may opt to administrative detention for security reasons, in that an individual is held by executive charge without criminal charges being brought against the internee.¹⁸⁹⁶ In light of the fact that the ICCPR does not seem to rule out the possibility that administrative detention could be lawful under IHL, but it is not clear whether states have to derogate in order to detain suspects under the

¹⁸⁹¹ Article 15(2), ECHR; see also Bianchi & Naqvi, ‘International Humanitarian Law’, *op. cit.*, p. 48.

¹⁸⁹² ICCPR, Article 4(2).

¹⁸⁹³ ACHR, Article 27(2).

¹⁸⁹⁴ See the case of *Guerrero v Colombia*, Communication No. R.11/45 (5 February 1979), UN Doc. Supp. No. 40 (A/37/40); *McCann et al v United Kingdom* (App n. 18984/91) ECHR 27 September 1995 paras 194, 200-01; *Zambrano Velez v Ecuador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 166 (4 July 2007) paras 84-85, 96, 101.

¹⁸⁹⁵ Bianchi & Naqvi, ‘International Humanitarian Law & Terrorism’, *op. cit.*, p. 49.

¹⁸⁹⁶ Generally see J. Pejic, ‘Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and other Situations of Violence’ 858 *IRRC* 375-6.

ICCPR.¹⁸⁹⁷ In contrast to the ICCPR, administrative detention is not included in the ECHR and it points to the need to derogate when taking such measures.¹⁸⁹⁸

Moreover, there is the prospect that some rights or specific elements of rights which are not stipulated by Article 4(2) of the ICCPR could be derogated from. Dennis has expressed reservation and concludes that ‘the proposition that there are other non-derogable rights in the ICCPR in addition to the catalogue of non-derogable rights provided in Article 4(2) of the ICCPR is doubtful.’¹⁸⁹⁹ Hence, even though Article 4(1) of the ICCPR indicates which of the specific articles are non-derogable, the HRC has pointed out to state parties that there are some other articles from the said Covenant which would be difficult to justify derogating from such as Articles 14 (the right to justice and fair trial) and 25 (the right to political participation) of the ICCPR.¹⁹⁰⁰ According to the HRC this indicates that ‘state parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norm of international law.’¹⁹⁰¹

4.8.5 Other international obligations

A fourth precondition of the regime of state of emergency is that the measures must be consistent with the state’s other international obligations. The procedural requirement is an important part of the derogation scheme.¹⁹⁰² The HRC has regularly impressed upon the requirements of Article 4(3) of ICCPR, as not a “mere formality”.¹⁹⁰³ The HRC in its first

¹⁸⁹⁷ In contrast, Hampson has noticed that ‘the reservation made by India at the time of the ratification and the derogation of the UK may imply that administrative detention is thought to be not normally lawful.’ F. Hampson, ‘Detention the “War on Terror” and International Law’ in H. Hensel (ed.) *the Law of Armed Conflict: Constraints on the Contemporary Use of Military Force*, Ashgate, 2005, 131-70, p. 143.

¹⁸⁹⁸ According to Article 5 of the ECHR the following are the permitted grounds of detention: ‘a person after conviction by a competent court’; ‘for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law’; ‘for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so’; ‘detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants’; ‘to prevent his affecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition’.

¹⁸⁹⁹ M. Dennis, ‘Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Round?’ *ILSA Journal of International & Comparative Law* 495 (Spring 2006), pp. 478-79.

¹⁹⁰⁰ See e.g. UN Doc. CCPR/C/SR.160, para 51 (Syria); UN Doc. CCPR/C/SR.430, para 32 (Peru); UN Doc. CCPR/C/SR.528, para 11 (Chile). Some scholars have suggested that the list of non-derogable rights contained in Article 4(2) of ICCPR should be extended, see D. McGoldrick, ‘the Interface between Public Emergency Powers’, *International Journal Constitutional Law* (2002) 2(2): 380-429, p. 416.

¹⁹⁰¹ General Comment no. 29, *op. cit.*, para 11.

¹⁹⁰² Bianchi & Naqvi, ‘International Humanitarian Law & Terrorism’, *op. cit.*, p. 51.

¹⁹⁰³ UN Doc CCPR/C/SR.496, para 19 (El Salvador); UN Doc CCPR/C/SR.335, para 24 (Uruguay).

General Comment on Article 4 stated that ‘it was important that state parties, in times of national emergency, inform other states parties of the nature and extent of the derogations they have made and of the reasons therefore, and further, to fulfill their reporting obligation under article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the relevant documentation.’¹⁹⁰⁴

This particular feature of ECHR has rarely been proved to be problematic in the past, however, in *Brannigan and McBride* the applicants had claimed that according to Art 4(1) of the ICCPR Covenant, in which, it is explicitly required that an emergency should have been “officially proclaimed” by the government, the applicants argued that the United Kingdom had never declared a state of emergency related to Northern Ireland.¹⁹⁰⁵ The European Court of Human Rights considered that there was no foundation for the applicants’ argument.¹⁹⁰⁶ The Court dismissed this argument and observed that the statement of the Home Secretary to Parliament regarding derogation was formal in character and made the position of the government clear and was “well in keeping with the notion of an official proclamation.”¹⁹⁰⁷

¹⁹⁰⁴ Office of the High Commissioner for Human Rights, CCPR General Comment No. 1: Article 4 (Derogations) Adopted by the 13th Session of Human Rights Committee, on 31 July 1981(UN Doc. A/36/40).

¹⁹⁰⁵ *Brannigan and McBride v United Kingdom*, *op. cit.*, para 72-73.

¹⁹⁰⁶ *Ibid.*

¹⁹⁰⁷ *Ibid.*, see also the Home Secretary’s statement to the British Parliament, Douglas Hurd, HC Debs. Standing Comm B, cols 234-5, 22 Dec 1988.

4.9 Legality of use of force against NSAGs

4.9.1 Introduction

This section concentrates on the issue of legality of use of force by the two sovereign states of Turkey and Iran against the Kurdish NSAGs of the PKK and PJAK. By operating trans-nationally they enjoy the safe haven of the *Qandil* Mountain area in the neighboring Kurdish populated semi-autonomous northern Iraq run by the Kurdistan Regional Government (KRG).¹⁹⁰⁸ In the last two decades the PKK and PJAK in recent years have repeatedly planned and launched military attacks upon Turkey and Iran from the shelter of that region. What is rather interesting in relation to the exercise of use of force by Turkey against the PKK and Iran against PJAK is the fact that over time they have made so little effort to rationalize their action legally nor have they in many cases informed the UN Security Council as required.¹⁹⁰⁹ It is also worth noting that the observers and the international community have by and large been ambivalent towards their actions.¹⁹¹⁰ This is in quite a contrast to more high profile interventions in recent years such as in the case of Afghanistan (2001), Iraq (2003), and Israel in Lebanon (2006) which attracted a lot more publicity and legal appraisal. From this study's point of view the crucial question that arises is whether an attack by a NSAG amounts to an armed attack since the legality of the use of force according to the UN Charter is only triggered if the attack is instigated by armed forces of a state.

The use of force in the state-centric international law is the preserve of the sovereign states even in the twenty-first century.¹⁹¹¹ Under the UN Charter and customary international law

¹⁹⁰⁸ Regarding the imposition of the no-fly zone in northern Iraq, generally see C. Gray, 'From Unity to Polarization: International Law and the Use of Force in Iraq', *EJIL*, (2002), 1-19.

¹⁹⁰⁹ This is in contrast to earlier policy adopted by Iran in the 1980s when it took military action against a coalition of Kurdish and other anti-government NSAGs operating out of northern Iraq. It relied on its inherent right to self-defence and on regular basis notified the UN Security Council.

¹⁹¹⁰ In spite of the ambivalence of the international community, some writers have attempted to evaluate the legality of use of force particularly Turkey against the PKK. See generally, T. Ruys, '*Quo Vatis Jus Ad Bellum?*: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq' 9 *Melb. J. Int'l L.* 334 2008, p. 345; C. Antonopoulos, 'The Turkish Military Operation in Northern Iraq of March-April 1995 and the International Law on the Use of Force', 1 *J. Armed Conflict L.* 33 1996; C. Grey and S. Olleson, 'The Limits of the Law on the Use of Force: Turkey, Iraq and the Kurds', (2001) 12 *Finch Yearbook of International Law*, 355.

¹⁹¹¹ Corten states that "... states still consider this rule as one of the attributes of their sovereignty, a sovereignty allowing them to continue to treat groups or individuals that challenge them as common criminals"; O. Corten, 'The Law Against War: Prohibition on the Use of Force in Contemporary International Law', (trans by C. Sutcliffe), Hart, 2010, p. 126.

the right of self-defence holds a special place in the *jus ad bellum*.¹⁹¹² In fact, 'states using force against another state almost invariably invoke self-defence.'¹⁹¹³ That is not to say that there is a universal agreement on its interpretation and boundaries. For instance, the US because of its overwhelming military capabilities has been more active in widening the boundaries of this right by proclaiming 'war on terror' in the aftermath of the 11 September 2001 attacks upon its soil by the Al Qaeda terrorist organization.¹⁹¹⁴

As previously discussed, it is non-international armed conflicts that predominate in the world today and the specter of inter-state conflict has been reduced to the relics of the past.¹⁹¹⁵ The use of force by private individuals in the shape of NSAGs is not new, nor is characterization of such groups as terrorists.¹⁹¹⁶ One of the most vital issues facing the international community is whether it is lawful for states to resort to force against NSAGs in particular extraterritorially under the invocation of self-defence.¹⁹¹⁷ Indeed, it has been argued that, this trend can be discerned from the implicit state practice of the individual states since the attacks upon the United States of 11 September 2001.¹⁹¹⁸

It is true, however, that nowadays military operations of the majority of NSAGs stretches beyond the borders of a particular state in that they are striving to achieve their political aims. Such military operations raise many issues within the ambit of international law such as violation of sovereignty and territorial integrity of the states attacked as well as state responsibility of the state that is harboring these NSAGs (willingly or not) from which the

¹⁹¹² The customary status of the right was affirmed in *Case Concerning Military and Paramilitary Activity in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep. 14, para 34; see also M.S. Myers & F.P. Feliciano, 'Law and Minimum World Public Order: the Legal Regulation of International Coercion', Yale U.P., 1961, p. 138.

¹⁹¹³ C. Grey, 'International Law and the Use of Force', 3rd ed., Oxford U.P., p. 114.

¹⁹¹⁴ C. Henderson, 'The Persistent Advocate and the Use of Force: the Impact of the United States upon the *Jus ad Bellum* in the Post-Cold War Era', Ashgate, 2010, P. 137

¹⁹¹⁵ According to Stockholm International Peace Research Institute (SIPRI), during the 10-year period 2001-2010, the vast majority of armed conflicts taking place globally are interstate in nature. For the seventh consecutive year, no interstate conflict was active in 2010. Only two of the conflicts active in 2001-2010 were fought between states: India-Pakistan (Kashmir) and Iraq versus the United States and its allies (2003). SIPRI Yearbook 2011: Armaments, Disarmament and International Security, Oxford U.P., 2011, p. 61.

¹⁹¹⁶ I. Brownlie, 'Principles of Public International Law', *op. Cit.*, p. 713; T. Ruys and S. Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence', 10 *JCSL*, p. 289 at p. 310; see also Higgins & Flory, 'Terrorism and International Law', *op. Cit.*, pp. 13-14.

¹⁹¹⁷ Perhaps the most obvious claim to justify extraterritorial use of force against a NSAG; see Gray, 'International Law and the Use of Force', *op. Cit.*, p. 159; Cassese, 'Terrorism is also Disrupting some Crucial Legal Categories of International Law', 12 *EJIL* (2001), p. 993; G. Abi-Saab, 'Introduction: the Proper Role of International Law in Combating Terrorism', in Bianchi, 'Enforcing International Law Norms against Terrorism', *op. Cit.*, pp. Xiii-xv.

¹⁹¹⁸ S.D. Murphy (ed.), 'Contemporary Practice of the United States Relating to International Law', 96 *AJIL* (2002) p. 237.

NSAGs' attacks had been launched.¹⁹¹⁹ Should there be a right to use force in self-defence against NSAGs particularly those launching attacks upon states from a neighboring state irrespective of the host state's involvement?

In the traditional inter-state armed conflicts, the self-defence paradigm was a clear cut concept, in that, army of one state would react to another state's army either massing on its border or as a reaction to an act of aggression by another state.¹⁹²⁰ It has been argued that the right of self-defence is created by and embedded in the fundamental right of states to survival.¹⁹²¹ Every state has an inherent right to use force in self-defence as reiterated by the ICJ in its 1996 Advisory Opinion on *the Legality of the Threat or Use of Nuclear Weapons*: '... The Court cannot lose the sight of the fundamental right of every state to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.'¹⁹²² With the emergence of NSAGs as organizations capable of attacks trans-nationally allied to the ambivalence of the highest international judicial organ, the ICJ to this issue has resulted in scholars taking extreme stands.¹⁹²³ On the one hand, there are those who believe that the right to self-defence and the use of military force only arises if such attacks are attributable to the host state,¹⁹²⁴ or the school of thought among legal scholars, domestic court judgments and in few occasions by Judges (albeit in minority) in the ICJ in favor of broadening the scope of the use of force by states against NSAGs without specifying whether there is a requirement for another state's involvement.¹⁹²⁵ Some authors even believe (wrongly in the opinion of the present author) that Security Council Resolutions 1368 and 1373, issued in the aftermath of the September 11 attacks provide states with a

¹⁹¹⁹ International Law Commission, Draft Articles on State Responsibility of State for Internationally wrongful Acts, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10(SUPP)(Dec. 12, 2001) [hereinafter Draft Articles] (according to Article 9 of the Draft Articles, "the conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority." See also J. Crawford, 'the International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries 387 (2001).

¹⁹²⁰ Generally see D.W. Bowett, 'Self-Defence in International Law', Manchester U.P., 1958.

¹⁹²¹ Dinstein, 'War, Aggression and Self-Defence', *op. Cit.*, p. 175.

¹⁹²² *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep, paras. 226, 263.

¹⁹²³ K. N. Trapp, 'Back to Basics: Necessity, Proportionality, and the Right to Self-Defence against Non-State Terrorist Actors', *ICLQ* Vol. 56, pp. 141-156, January 2007, p. 141.

¹⁹²⁴ See e.g. A. Cassese, 'the International Community's Legal Response to Terrorism' (1989) 38 *ICLQ* 589, 596-7; see also P. Lamberti-Zanardi, 'Indirect Military Aggression' in A. Cassese, 'the Current Legal Regulations of the Use of Force', Kluwer Academic: London, 1986.

¹⁹²⁵ Y. Dinstein, 'War, Aggression and Self-Defence', *op. Cit.*, p. 201-208; D. Janse, 'International Terrorism and Self-Defence', (2006) 36 *Israel Yearbook of Human Rights Review* 149, p. 170-171; J. Paust, 'The Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond', 35 *Cornell J.I.L.* (2002), p. 534; R. Wedgwood, 'Responding to Terrorism: the Strike's against Bin Laden', 24 *Yale J.I.L.* (1999), p. 564.

blank cheque to take defensive action against all attacks by NSAGs.¹⁹²⁶ For the purpose of this study and in the light of the recent events concerning the activities of NSAGs this study will primarily evaluate the legality of self-defence by Turkey and Iran against the PKK and PJAK respectively who launch trans-boundary armed attacks from northern Iraq in order to further a political or ideological objective.

4.9.2 Background to Turkey's cross-border operations

Turkey has long claimed to have an inherent right to resort to measures which are necessary for its security and protection of its citizens, including use of direct force against the PKK.¹⁹²⁷ Turkey's provinces of Sirnak and Hakkari share a 240 mile border with Iraq's provinces of Erbil and Dahuk. In the last decade, the PKK has used this border region to launch attacks on the Eastern provinces of Turkey. Historically PKK's sphere of activities has been across large portions of the Turkish borders with Iran and Syria, another 920 miles in length, sharing some of the operational territory with the Party of Free Life of Kurdistan (PJAK). The PKK has operated from the safe haven of northern Iraq for the last three decades. As discussed above, initially due to its tangible military capability the PKK launched armed attacks from its bases inside the Turkish territory but used the Kurdish populated northern Iraq as a refuge and regrouping area. Northern Iraq became a safe haven for the PKK especially after the invasion of Kuwait by Iraqi forces and the ensuing Gulf War which resulted in the creation of a *de facto* Kurdish entity in northern Iraq for the protection of Kurdish population of Iraq.¹⁹²⁸ Since 1983, Turkey has launched regular cross-border attacks against the PKK to disrupt its training camps and operation. Initially, Turkey carried out its military operations especially in 1986 and 1987 with the consent of the Baathist regime in Iraq on the basis of cross-border cooperation agreements between the two states and the UK in 1926.¹⁹²⁹ There were also reports of other cross border co-operation between Turkey and Iraq in the 1980s.¹⁹³⁰

¹⁹²⁶ T. Franck, 'Terrorism and the Right of Self-Defence', 95 *AJIL* (2001) p. 839; C. Greenwood, 'International Law and Pre-emptive Use of Force: Afghanistan, Al-Qaeda, and Iraq' (2003) 4 *San Diego ILJ* 7, p. 17.

¹⁹²⁷ K.N. Trapp, 'State Responsibility for International Terrorism', Oxford U.P., 2011, p. 56.

¹⁹²⁸ P.S. Hadji, 'The Case for Kurdish Statehood in Iraq', 41 *Case Western Reserve Journal of International Law* 514 2009, p. 519.

¹⁹²⁹ This relates to the Article 6 in Chapter II: "Neighbourly Relations" of The Treaty between the UK, Iraq and Turkey Regarding the Settlement of the Frontier between Turkey and Iraq, signed at Angora (Ankara) 5 June 1926, provided for a various obligations for cross-border incidents but does not stipulate any right of hot pursuit. See the text reproduced in *AJIL*. vol. 21, no. 4, Oct 1927, pp. 136-143.

¹⁹³⁰ There are no available texts of the agreements but Bulloch and Morris refer to the 1982 agreement between the two states; J. Bulloch & H. Morris, 'the Gulf War its Origins, History and Consequences', Methuen, 1989, p. 34; Grey and Olleson, 'The Limits of the Law on the Use of Force, *op. cit.*, p. 378.

However, since the Gulf War in 1991 and because of Turkey's support for the coalition forces that removed Iraq from Kuwait, Iraq became more vociferous against the Turkish incursions and complained repeatedly to the UN Security Council on many occasions.¹⁹³¹ It has been noted that unlike Iraq that repeatedly registered its complaint to the UN Security Council, Turkey never made any effort to provide a legal appraisal for its actions to the UN Security Council.¹⁹³² Because of restriction of Iraqi sovereignty and the military measures imposed on northern part of its territory by the US and its allies, Iraq accused Turkey of taking advantage of the abnormal situation by violating its territorial integrity.¹⁹³³ However, Turkey based its argument to use force on Iraq's inability to control its northern border to prevent cross border attacks by the PKK.¹⁹³⁴

It was during the early 1990s that Turkey as part of its new strategy towards the PKK established a five-kilometer wide security zone along the Turkish-Iraqi border.¹⁹³⁵ It is significant to point out that even after imposition of the no-fly zone in northern Iraq, Turkey carried out operations against the PKK with the help of the two Kurdish NSAGs of KDP and PUK who were concerned about the PKK establishing a permanent base in northern Iraq.¹⁹³⁶ The earlier operations against the PKK were explained by the Turkish officials as applications of the right of hot pursuit.¹⁹³⁷ Since 1992, Turkey has annually continued this practice.¹⁹³⁸ These military operations have ranged from isolated raids by Special Forces Units to several corps-sized (10,000-40,000 troops) operations involving thousands of troops. The first extraterritorial operation that was not based on hot pursuit took place in March 1992, when the Turkish air force targeted the PKK camps in northern Iraq.¹⁹³⁹ Turkey continued its military operations against the PKK training bases in northern Iraq in January

¹⁹³¹ UN Doc S/1995/254, UN Doc S/23152, UN Doc S/23141, UN Doc S/23152, UN Doc S/23153.

¹⁹³² Grey and Olleson, 'The Limits of the Law on the Use of Force, *op. cit.*, p. 380.

¹⁹³³ UN Doc S/25864; UN Doc S/1995/141.

¹⁹³⁴ See letter dated 24 July 1995 from the Charge D'affaires of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, UN Doc. S/1995/605; identical letters dated 27 June 1996 from the Charge D'affaires of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and to the President of the Security Council, UN Doc S/1996/479; Identical letters dated 16 July 1997 from the Charge D'affaires of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and to the President of the Security Council, UN Doc S/1997/552. In none of the above letters to the Security Council did Turkey invoke Article 51 of the UN Charter in exercise of its right to self-defence.

¹⁹³⁵ F. Keskin, 'Turkey's Trans-Border Operations in Northern Iraq: Before and After the Invasion of Iraq', *Research Journal of International Studies*, (2008), volume 8, 59-72, p. 61.

¹⁹³⁶ M. Gunter, 'Kurdish Infighting: the PKK-KDP Conflict', in Olson (ed.) 'the Kurdish Nationalist Movement in the 1990s', *op. cit.*, pp. 50-62.

¹⁹³⁷ Keskin, 'Turkey's Trans-Border Operations in Northern Iraq', *op. cit.*, p. 62.

¹⁹³⁸ Grey & Olleson, 'The Limits of the Law on the Use of Force, *op. cit.*, p. 377.

¹⁹³⁹ The UN Commissioner for Refugees, Sadako Ogato, expressed concern for the killing of nine people, including women and children, as a result of the Turkish air raid in an Iraqi village 30 km inside the Iraqi border. *Keesing's Record of World Events* (March 1992) 38833.

1994,¹⁹⁴⁰ March 1995 and again in May and September of 1997.¹⁹⁴¹ However, the first major Turkish land offensive launched against the PKK's positions in northern Iraq was on 20 March 1995, code named operation Twilight.¹⁹⁴² This major military operation involved 35,000 Turkish troops, the use of Cobra attack helicopters and F-16 jet fighters bombing PKK position 40 Kilometers inside the Iraqi territory.¹⁹⁴³ President Tansu Çiller stated that the purpose of the operation was 'to rip out the roots of the terror operations aimed at our innocent people.'¹⁹⁴⁴ In a further statement the Turkish Premier said of the military operation in northern Iraq, 'call it a hot pursuit operation. We are not against the innocent civilians. We will be there as long as necessary.'¹⁹⁴⁵ The international community did not broadly support the use of force taken by Turkey in Iraq especially in light of the fact that the actions of the PKK could not be attributed to Iraq.¹⁹⁴⁶ The Arab League and the Gulf Cooperation Council condemned Turkey's military operation in northern Iraq,¹⁹⁴⁷ the European states called upon Turkey to immediately withdraw its troops from the Iraqi territory.¹⁹⁴⁸ The US was the only state that recognized Turkey's right to defend itself from attacks from a neighboring state, but similarly urged Turkey to withdraw its troops from the region.¹⁹⁴⁹ In riposte, Turkey maintained that it respected Iraq's territorial integrity and had to take action against the PKK since Iraq was unable to exercise authority over its northern territory to prevent such attacks.¹⁹⁵⁰ In spite of Iraq's protestation the issue was not put on the Security Council agenda.¹⁹⁵¹ The incursion of May 1997, involved 50,000 troops and 250 tanks backed by heavy artillery.

¹⁹⁴⁰ *Keesing's Record of World Events* (January 1994) 39834.

¹⁹⁴¹ *Keesing's Record of World Events* (May 1997) 41651; *Keesing's Record of World Events* (October 1997), 41877.

¹⁹⁴² *Keesing's Record of World Events* (March 1995) 40473.

¹⁹⁴³ Antonopoulos, 'The Turkish Military Operation in Northern Iraq', *op. cit.*, p. 33.

¹⁹⁴⁴ *Keesing's Record of World Events* (March 1995) 40473.

¹⁹⁴⁵ Antonopoulos, 'The Turkish Military Operation in Northern Iraq', *op. cit.*, p. 33; the Guardian Weekly, vol. 152, 26 March 1995, p. 3.

¹⁹⁴⁶ See identical letters dated 14 June 1997 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary General and the President of the Security Council, UN Doc S/1997/461; according to Libya, the US did give its tacit support to Turkey to use force against the PKK as a legitimate exercise of the right of self-defence. Letter dated 12 July 1995 from the *Charge D'affaires* of the Permanent Mission of Libyan Arab Republic to the United Nations addressed to the President of the Security Council, UN Doc S/1995/566; Ruys & Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence', *op. Cit.*, p. 295.

¹⁹⁴⁷ *Ibid.*

¹⁹⁴⁸ *Keesing's Record of World Events* (March 1995) 40474, 40522.

¹⁹⁴⁹ *Keesing's Record of World Events* (March 1995) 40474.

¹⁹⁵⁰ See (1995) *United Nations Yearbook* 494; (1996); *United Nations Yearbook* 236-7; T. Franck, 'Recourse to Force: State Action against Threats and Armed Attacks, Cambridge U.P., 2002, p. 63.

¹⁹⁵¹ Ruys & Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence', *op. Cit.*, p. 296.

4.9.3 Background to Iran's cross-border operations

Likewise, imposition of the no-fly zone in northern Iraq provided a variety of dissident Iranian NSAGs with a safe haven. In the early 1990s, the Islamic regime in Iran started its operations against a multitude of NSAGs (including Kurdish ones) such as Peoples' Mujahedin Organization of Iran (PMOI) and fighters belonging to the Kurdish Democratic Party of Iran (KDP-I) based in northern Iraq. It is worth mentioning that PMOI and KDP-I were initially part of the armed wing of the National Council of Resistance of Iran (NCRI), formed in 1981, as the main opposition to the theocratic regime in Iran.¹⁹⁵² In marked contrast to Turkey, in order to justify its excursions into northern Iraq in pursuit of Kurdish NSAGs, Iran has relied on its right to self-defence under Article 51 of the UN Charter.¹⁹⁵³ Iran invoked the right to self-defence against Kurdish NSAGs in northern Iraq and duly informed the UN Security Council:

During the past few weeks, bands of armed and organized terrorist mercenaries have engaged in trans-border military attacks against and sabotage in Iranian border provinces ... In response to these armed attacks from inside Iraq and in accordance with Article 51 of the Charter of the United Nations, today, 25 May 1993, the fighter jets of the Islamic Republic Air Force carried out a brief, necessary and proportionate operation against the military basis of the terrorist group ...¹⁹⁵⁴

In November 1994, Iran informed the Security Council specifying attacks by anti-government NSAGs originating from inside the Iraqi territory, and stated that 'in accordance with its inherent right of self-defence enshrined in Article 51 of the Charter of the United Nations, the Islamic Republic of Iran took two proportional and necessary steps.' Prior to this, Iran had protested to Iraq regarding presence of PMOI and KDP-I and their hit and run raids on the Iranian territory.¹⁹⁵⁵

In the mid-1990s, Iran used the same rationale as Turkey, arguing that because of Iraq's inability to exercise control over its northern part it left Iran with no alternative but to use

¹⁹⁵² For Background information see *People's Mujahedin Organization of Iran v US Department of State*, 183 F.3d 17 (DC Cir. 1999); *NCRI v US Department of State*, 251 F.3d 192.

¹⁹⁵³ Grey and Olleson, 'The Limits of the Law on the Use of Force, *op. cit.*, p. 395.

¹⁹⁵⁴ Letter, dated 25 May 1993, from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary General of the United Nations, UN Doc S/25843.

¹⁹⁵⁵ 'The Government of the Islamic Republic of Iran, once again, strongly protests the presence of terrorist organization ... in the territory of Iraq and considers the support provided by the government of Iraq for that organization as a blatant interference in the internal affairs of Iran and holds Iraq fully responsible for the criminal acts of this terrorist organization.' Note verbale dated 20 July 1994 from the Ministry of the Foreign Affairs of the Islamic Republic of Iran addressed to the Embassy of the Republic of Iraq at Tehran; 21 August 1994, UN Doc S/1994/983.

force to protect itself.¹⁹⁵⁶ However, every time Iran invoked Article 51 and in step with its obligations under the UN Charter, Iran has informed the UN Security Council whenever it has embarked on major military operations against NSAGs in northern Iraq.¹⁹⁵⁷ Iran's extraterritorial operations against the Kurdish and other NSAGs continued well into the 1990s. In 1999, in a letter to the Secretary General of the UN Iran stated:

The proportionate actions by Iran, against terrorist bases and targets in Iraq which have been used to train terrorists and generate terrorism against Iran, have been taken in a discriminate manner and in exercise of the inherent right of self-defence as set out in Article 51 of the Charter of the United Nations ... in pursuance of this policy and in the exercise of its right of self-defence of the Charter, the concerned authorities of the Islamic Republic of Iran targeted a well-known active terrorist camp, located in the territory of Iraq, on 10 June 1999. This proportionate action was a necessary defensive measure against the perpetrators of the terrorist of the terrorist crimes that had been carried out against Iran and its citizens.¹⁹⁵⁸

As a reaction to these encroachments upon its territory, Iraq repeatedly complained to the UN Security Council and stated that it was not culpable for the activities of the NSAGs operating out of its northern territory against the Iranian regime.¹⁹⁵⁹ In several occasions Iraq also accused Iran of supporting and hosting Kurdish NSAGs opposed to the Iraqi government.¹⁹⁶⁰ However, the Iranian government reiterated its commitment to Iraqi sovereignty and territorial integrity, it state:

... Iran emphasizes that this limited and proportionate operation was carried to stop cross-border attacks against the Islamic Republic of Iran from the Iraqi territory ... should not be construed as infringing the territorial integrity of Iraq. The Islamic Republic of Iran respects Iraq's territorial integrity and looks forward to promoting friendly relations with its neighbors.¹⁹⁶¹

Since 2006, Iran has faced the armed challenge of Party for a Free Life of Kurdistan (PJAK) operating from the safe haven of northern Iraq. As discussed above, PJAK is known as the sister organization of the PKK and part of the Union of Communities in Kurdistan (*Koma Civakên Kurdistan*, KCK). Since 2007, Iran has been reported to have targeted camps of

¹⁹⁵⁶ Grey and Olleson, 'The Limits of the Law on the Use of Force, *op. cit.*, p. 396.

¹⁹⁵⁷ E.g. see UN Doc S/1996/602; UN Doc S/1996/617.

¹⁹⁵⁸ Letter dated 12 July 1999 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary General, UN Doc S/1999/781.

¹⁹⁵⁹ Grey and Olleson, 'The Limits of the Law on the Use of Force, *op. cit.*, p. 398.

¹⁹⁶⁰ UN Doc S/1999/781.

¹⁹⁶¹ UN Doc S/2001/271.

PJAK in northern Iraq.¹⁹⁶² This is a very unique situation in which Turkey and Iran two regional powers with their complex relations find themselves in. It is now clear that by the creation of KCK and the merger of its military challenge, it is now directing its military challenge towards both countries. In recent years, because of the closeness of the PKK and PJAK, Turkey and Iran have increasingly coordinated their military operations against the two Kurdish NSAGs.¹⁹⁶³

4.9.4 The prohibition of use of force by NSAGs in international law

It has to be stressed that any use of force by NSAGs is unlawful in international law or any domestic law.¹⁹⁶⁴ The prohibition of the use of force, as postulated in Article 2(4) of the UN Charter also extends to the use of force by NSAGs against a state.¹⁹⁶⁵ In international law, the use of force by a NSAG is generally termed as *indirect* use of force when it is supported in the shape of being trained, armed, and financed by a state (host state) and is sent into another state (victim state) in search of achieving their aim through use of force.¹⁹⁶⁶ It is therefore, not surprising that this type of force is censured in a number of documents. The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty provides in operative paragraph 2 that ‘...No state shall organize, assists, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state ...’¹⁹⁶⁷ Furthermore, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations stipulates that ‘... Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts within another State ...’ The Declaration elaborates and interprets the prohibition of the threat or use of force provided in Article 2(4) of the UN Charter. Article 3(g) of the definition of aggression prescribes that the ‘... sending by or on behalf of a State of armed bands, groups of irregular or mercenaries which carry out

¹⁹⁶² A.L. Butters, Why is Iran Shelling Iraq? 20/08/2007, Time World, 20 August 2007 <<http://www.time.com/time/world/article/0,8599,1654449,00.html>>.

¹⁹⁶³ ‘Iran and Turkey vow to strengthen Cooperation against terrorism’, Today’s Zaman, 21 October 2011 <http://www.todayszaman.com/newsDetail_getNewsById.action?newsId=260548>.

¹⁹⁶⁴ Generally see A-M. Slaughter & W. Burke-White, ‘An International Constitutional Moment’, *Harvard Int’l L. J.* 2 (2002); N. Ronzitti, ‘The Expanding Law of Self-Defence’, *JCSL* 11:3 (2006), 343-359, p. 344.

¹⁹⁶⁵ C. Antonopoulos, ‘Force by Armed Groups as Armed Attacks and Broadening of Self-Defence’, *Neth. Int’l L. R.*, LV: 159-180, 2008, p. 162; Ruys & Vehoeven, ‘Attacks by Private Actors and the Right of Self-Defence’, *op. cit.*, p. 310; Shaw, ‘International Law’, *op. cit.*, p. 1149.

¹⁹⁶⁶ *Nicaragua*, ICJ Reports, 1986, pp. 14, paras 108 & 109-110.

¹⁹⁶⁷ GA Res. 2131 (XX) of 21 December 1965.

acts of armed force against another State or its substantial involvement therein ...’ shall constitute aggression. Finally, according to the Declaration on the Enhancement and Effectiveness of the Principle of Refraining from the Threat or Use of Force in International relations, ‘... States shall fulfill their obligations under international law to refrain from organizing, instigating or assisting or participating in paramilitary terrorist or subversive acts, including acts of mercenaries in other States, or acquiescing in organized activities within their territory directed towards the commission of such acts...’¹⁹⁶⁸ The abovementioned General Assembly Resolutions are as such not binding documents on UN member states. Furthermore, General Assembly Resolutions are not included in the list of sources of international law that appears in Article 38(1) of the Statute of the International Court of Justice. However, they are not to be discarded as legally insignificant for they are considered to serve as material, namely, evidentiary sources of customary international law.¹⁹⁶⁹

4.9.5 The right to self-defence: procedural obligations

At the outset, it must be noted that the use of force in self-defence in international law is regulated by both treaty law and custom. This is a point made clear by the ICJ in the first of the merits decisions in the *Nicaragua* case that ‘there can be no doubt that the issues of the use of force and collective self-defence raised in the present proceedings are issues which are regulated both by customary international law and by treaties, in particular by the United Nations Charter.’¹⁹⁷⁰ However, the ICJ goes on to emphasize that the substantives rules on self-defence have their basis in customary international law are not always identical in content to those contained in multilateral treaties on the subject.¹⁹⁷¹ As a consequence, the present system of self-defence is a combination of pre-Charter customary international law position and the right stipulated in Article 51 of the UN Charter.¹⁹⁷² The pre-Charter customary international law was regulated by two conditions namely; necessity and

¹⁹⁶⁸ GA Res 42/22 of 1987, GOAR 42nd session, sup. No 49, p. 278.

¹⁹⁶⁹ The ICJ has in a number of cases utilized General Assembly Resolution as confirming the existence of *opinion juris*, Shaw, ‘International Law’, *op. cit.*, p. 88; see e.g. *The Legality of the Threat or Use of Nuclear Weapons case*, ICJ Reports, 1996, pp. 226, 254-5; 110 ILR, p. 163. See also *Western Sahara case*, ICJ Reports, 1975, pp. 31-3; *The East Timor case*, ICJ Reports, 1995, pp. 90, 102; ILR, p. 226.

¹⁹⁷⁰ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, merits, ICJ Reports, 1986, p. 14, para. 34.

¹⁹⁷¹ *Ibid*, at para. 175.

¹⁹⁷² J.A. Green, ‘Self-Defence: A State of Mind for States?’ *NILR LV*: 181-206, 2008, p. 185.

proportionality, origins of which could be traced well into international legal theory.¹⁹⁷³ Nevertheless, the *Caroline* incident in the nineteenth century has played a pivotal role in regulating resort to the use of military force in self-defence in regards to customary international law.¹⁹⁷⁴ Ultimately, self-defence is the only exception states can legitimately justify to resort to the use of force under international law without prior authorization of the UN Security Council.¹⁹⁷⁵

In the post-1945 era, the appropriate treaty law framework to deal with this issue can be found in Article 2(4) and Article 51 of the UN Charter.¹⁹⁷⁶ The exercise of the right to self-defence in modern international law according to the ICJ is also regulated by two further preconditions not listed in Article 51, namely; the principles of necessity and proportionality based on customary international law.¹⁹⁷⁷ Nonetheless, by strict reading of the term of these provisions, it is clear that the use of force on the international plane has traditionally been an inter-state phenomenon and excluded measures of self-defence against NSAGs, unless a certain degree of another state's involvement were to be established.¹⁹⁷⁸

Article 2(4), prohibits any use of force by one state against the territorial integrity or political independence of another.¹⁹⁷⁹ This Article has been described as one of the bedrocks of modern international order and is contained in the first Chapter of the UN Charter.¹⁹⁸⁰ It sets out the purposes and principles of the United Nations and the majority of legal scholars attribute the norm contained in Article 2(4) as of *jus cogens* character.¹⁹⁸¹ Article 2(4) states:

¹⁹⁷³ The rule of proportionality according to Rogers "is an attempt to balance the conflicting military and humanitarian interests (or military necessity and humanity) and is more evident in connection with the reduction of incidental damage caused by military operations, A. P. V. Rogers, 'Law on the Battlefield', Manchester U.P., 2nd ed., 2004, p. 17; see also D.H.N. Johnson, 'the Legality of Modern Forms of the Aerial Warfare', *Royal Aeronautical Society Journal*, August, 1968, p. 685, cited in Rogers, 'Law on the Battlefield', *op. cit.*, p. 17.

¹⁹⁷⁴ For background to the case see I. Brownlie, 'International Law and the Use of Force by States', Oxford UP, 1963, pp. 42-44.

¹⁹⁷⁵ I. Brownlie, 'International Law and the Use of Force by States Revisited', 1 *Chinese JIL* (2002), pp. 1-19.

¹⁹⁷⁶ Generally see B. Simma, 'Charter of the United Nations: A Commentary', Vol. I., Oxford U.P., 2nd ed., 2002.

¹⁹⁷⁷ See, e.g. *The Legality of the Threat or Use of Nuclear Weapons case*, ICJ Reports, 1996, pp. 245; *Oil Platforms (Iran v US)* (Judgement) [2003] ICJ Rep 161, 196 [hereinafter '*Oil Platforms*'].

¹⁹⁷⁸ J.L. Kuntz, 'Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations' (1947) 41 *AJIL* 872-879; H. Kelson, 'Collective Security and Collective Self-Defence under the Charter of the United Nations' (1948) 42 *AJIL* 783-796; M. Reisman, 'Criterion for the lawful Use of Force in International law', (1984-85) *Yale JIL*, pp. 279-285.

¹⁹⁷⁹ Article 2(4) has been described as the right *par excellence* which might be protected by the right of self-defence. Bowett, 'Self-Defence in International Law', *op. cit.*, p. 30.

¹⁹⁸⁰ A. Randelzhofer, 'Article 2(4)' in B. Simma (ed.), 'The Charter of the United Nations, A Commentary', Oxford U.P., 1994, pp. 108-9; L. Henkin, 'The Reports of the Death of Article 2(4) are Greatly Exaggerated' *AJIL* 544 (1971) 544.

¹⁹⁸¹ See e.g. Shaw, 'International Law', *op. cit.* P. 1123; Cassese, 'International Law in a Divide World', *op. cit.*, p. 141.

All members of the United Nations shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations.¹⁹⁸²

In spite of too many violations of Article 2(4), there is a universal agreement among states that it continues to be binding.¹⁹⁸³ The prohibition to use force is not absolute and according to the UN Charter there are two exceptions under which states can resort to use force. It is either authorized by the UN Security Council under Chapter VII (Article 42) of the UN Charter or in pursuit of the inherent right to self-defence according to Article 51 of the Charter. This study is primarily concerned with whether there is an inherent right of states to take armed action against NSAGs in self-defence according to Article 51 of the UN Charter. There have been few occasions that collective action under Chapter VII of the Charter has been authorized by the UN Security Council specifically directed at NSAGs as in the case of Bosnian Serbs,¹⁹⁸⁴ the UNITA organization in Angola,¹⁹⁸⁵ and latterly in the case of the Al-Qaeda organization based in Afghanistan.¹⁹⁸⁶ The other exception to Article 2(4) is set out under Article 51 of the UN Charter which Provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

There are other conditions imposed upon states to ensure that the right to self-defence is not abused by the high contracting parties to the UN Charter. This is in light of the fact that, due to the so-called '*until clause*' if the Security Council has taken steps to restore peace and

¹⁹⁸² This has been described as a significant development in international law since the article outlaws not only recourse to 'war', as in the case of Kellogg-Briand Pact of 1928, but also any use of force which may imperil the territorial integrity or political independence of another state, even uses of force 'short of war', such as peacetime reprisal is prohibited under Article 2(4); A.C. Arend & R.J. Beck, 'International Law and the Use of Force: Beyond the Charter Paradigm', Routledge, 1993, p. 31.

¹⁹⁸³ T. Gazzini, 'The Changing Rules in the use of Force in international law', Manchester U.P., 2005, p. 124.

¹⁹⁸⁴ SC Res. 770 (1992) of 13 August 1992; SC Res. 942 (1994) of 23 September 1994.

¹⁹⁸⁵ SC Res. 864 (1993) of 15 September 1993.

¹⁹⁸⁶ See SC Res. 1368 (2001) & SC Res. 1373.

security, the right of self-defence by the state in question is suspended.¹⁹⁸⁷ Secondly, states are required to report to the Security Council regarding their actions prompted by the use of force in self-defence and to provide it with evidence in support of their self-defence claim.¹⁹⁸⁸ The majority of scholars are of the opinion that failure to do so does not render the use of force unlawful, a position concurred by the ICJ in the *Nicaragua* Case.¹⁹⁸⁹ They agree, however, that the reporting requirement carries an evidential impact, in the sense that if a state were not to comply with it may indicate that it is not exercising its right to self-defence.¹⁹⁹⁰ State practice as will be discussed below in this regard is rather sketchy and proliferation of the use of force under the proviso of self-defence since the creation of the UN points to a *prima facie* disregard to the prohibition stipulated in Article 2(4) of the Charter. This is mainly due to the inadequacy of its preventive mechanism and its apparent insignificance in the *realpolitik* of international relations.¹⁹⁹¹ Nonetheless, it is worth mentioning that more often than not states have attempted to justify their action as exercise of the use of force in self-defence, which the following pronouncement by the ICJ in *Nicaragua* (Merits) case encapsulates the effect of such practice by states:

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a state acts in a way *prima facie* incompatible with a recognized rule, but it defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the state's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule.¹⁹⁹²

There is no question that the above rule reinforces the validity of prohibition of the use of force in international law, however, it should be assessed according to the state practice prior

¹⁹⁸⁷ T. Ruys, 'Quo Vatis Jus Ad Bellum?: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq' 9 *Melb. JIL* 334 2008, p. 345; for an outline of this obligation see e.g. M. Halberstam, 'The Right of Self-Defence once Security council Takes Action' (1996) 17 *Mich. JIL* 229.

¹⁹⁸⁸ On the nature of this requirement, see D.W. Greig, 'Self-Defence and the Security Council: What Does Article 51 Require?' 40 *ICLQ* (1991) p. 366, at 367-388; J.I. Charney, 'The Use of Force against Terrorism and International Law', 95 *AJIL* (2001) 835, p. 836.

¹⁹⁸⁹ See *Nicaragua* [1986] ICJ Rep 14, pp. 105,121.

¹⁹⁹⁰ R. Higgins, 'The Development of International Law through the Political Organs of the United Nations' (1963) 207; Dinstein, 'War, Aggression and Self-Defence', *op. cit.*, p. 217-218; Gray, *International Law and the Use of Force*, *op. cit.*, p. 121.

¹⁹⁹¹ T. Franck, 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States', 64 *AJIL* (1970) p. 809; *idem*, 'What Happens Now? The United Nations after Iraq' 97 *AJIL* (2003) p. 607; M.J. Glennon, 'The Emerging Use of Force Paradigm', 11 *JCSL* (2006) p. 309, at pp. 310-311.

¹⁹⁹² See *Nicaragua* [1986] *Merit* ICJ Rep 14, pp. 98.

to the time of the judgment and the influence of the Cold War on such practices.¹⁹⁹³ Writing in 1962 at the height of the Cold War, Fawcett even suggested that great powers may be precluded from using force in response to attacks from NSAGs, while smaller and weaker countries may suffer no such disability. He opines: ‘Armed bands ... may constitute no threat at all to a powerful state but their operations may well amount to an ‘armed attack’ upon a militarily weak or unstable state.’¹⁹⁹⁴ We should be reminded that the general debate among practitioners and scholars of international law regarding the use of force in that period mainly concentrated on the relationship between Article 2(4), the prohibition of the use of force and Article 51, the inherent right to self-defence purely in the context of inter-state relations.¹⁹⁹⁵ But it is debatable whether the abovementioned rule is still relevant in the light of the present state practice in the aftermath of the Cold War and the proliferation of the unilateral use of force implicitly practiced by states against NSAGs.¹⁹⁹⁶

4.9.6 The customary law requirement of necessity and proportionality

All states are in agreement that the principles of necessity and proportionality are the basic core of self-defence.¹⁹⁹⁷ The principles of necessity and proportionality are not mentioned in either Articles 2(4) or 51 of the UN Charter.¹⁹⁹⁸ International law doctrine states that the use of force in self-defence is conditioned on these two principles and they are recognized as part of customary international law by the ICJ.¹⁹⁹⁹ Moreover, these standards act as the checks and balances in terms of regulating states from halting or repelling of an armed attack and should not exceed its goal.²⁰⁰⁰ If the action taken by a state does not meet the above criteria then it would be construed as an unlawful reprisal as opposed to a lawful self-defence.²⁰⁰¹ Although

¹⁹⁹³ Antonopoulos, ‘Force by Armed Groups as Armed Attacks and Broadening of Self-Defence’, *op. Cit.*, p. 160.

¹⁹⁹⁴ J.E.S. Fawcett, ‘Intervention in International Law: A Study of Some Recent Cases’, 103 *RECUEIL DES COURS* 343, 363 (1962).

¹⁹⁹⁵ *ibid*

¹⁹⁹⁶ For a commentary on state practice see W.M. Reisman & A. Armstrong, ‘The Past and Future of Preemptive Self-Defence’, 100 *AJIL* (2006) P. 525 at 526; Antonopoulos, ‘Force by Armed Groups as Armed Attacks and Broadening of Self-Defence’, *op. Cit.*, p. 162.

¹⁹⁹⁷ However, there are some scholars (albeit in minority) that have rejected these limits on self-defence as part of customary international law, e.g. Kunz, Individual and Collective Self-defence in Article 51 of the Charter of the UN, 41 *AJIL* (1947)872; Gardam, ‘Proportionality and Force in International Law’ 87 *AJIL* (1993) 391.

¹⁹⁹⁸ Gray, International Law and the Use of Force’, *op. cit.*, p. 150.

¹⁹⁹⁹ See *Nicaragua* [1986] ICJ Rep 14, 103; *Oil Platforms* [2003] ICJ Rep 161, 186-7.

²⁰⁰⁰ Gray, International Law and the Use of Force’, *op. cit.*, p. 147.

²⁰⁰¹ Such unlawful reprisals according to General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations 1970, “States have a duty to refrain from acts of reprisal involving the use of force.” GA Res. 2625 (xxx) UN GAOR, Supp. No. 28; See also *Corfu Channel Case (UK v Albania)*, 1949 ICJ 4, 108-09.

often mentioned in tandem, the ICJ has typically applied them separately. One of the main prerequisites of the doctrine of necessity is that prior to the use of force every effort has been made for the peaceful resolution of the situation.²⁰⁰²

The *Caroline* case provided guidelines as to when force could be utilized in self-defence.²⁰⁰³ In reality the aforementioned case has been cited as one of the very first instances in which armed forces of a state took action against a non-state actor.²⁰⁰⁴ In 1837, Daniel Webster US Secretary of state elucidated a definition of self-defence that has subsequently evolved into customary international law.²⁰⁰⁵ Webster's definition was based on the incident involving the *Caroline*, a US steam boat shipping supplies to Canadian insurgents fighting the British forces.²⁰⁰⁶ While the vessel was anchored within the US territorial water an armed band under the command of a British officer crossed the river and proceeded to set it on fire and let it drift over Niagara Falls. Replying to Lord Ashburton, Webster stated that the action taken by the British did not amount to self-defence since self-defence is only justified:

If the necessity of that self-defence is instant, overwhelming and leaving no moment for deliberations. It will be for it to show, also, that ... [it] did nothing unreasonable or excessive; since the act justified by the necessity of self-defence must be limited by necessity, and kept clearly within it.²⁰⁰⁷

Webster was also of the opinion that Britain should have resorted to Diplomatic means rather than the military option which in his opinion was to be used as a last resort.²⁰⁰⁸ Furthermore, the abovementioned statement encapsulates the concept of necessity and proportionality regarding resorting to military force in self-defence.

²⁰⁰² The position on this issue depends very much on which stage in the chain of events this is being explored, whether the initial attack is over or more attacks are expected. Gray, *International Law and the Use of Force*, *op. cit.*, p. 150.

²⁰⁰³ Although Sir Robert Jennings refers to this incident '*locus classicus*' of self-defence, because the use of force at the time was not being legally prohibited, the incident did not have an impact on the customary international law; R. Jennings, 'The *Caroline* and *McLeod* Cases', (1938) 32 *AJIL* 82; the *Caroline* Case, 29 *British and Foreign State Papers*, 1129.

²⁰⁰⁴ N. Lubell, 'Extraterritorial Use of Force against Non-State Actors', Oxford U.P., 2011, p. 35.

²⁰⁰⁵ Customary international law 'derives from "a general practice accepted as law"' International Committee of Red Cross, *Customary International Humanitarian Law: Questions and Answers*, 15 August 2005 <<http://www.icrc.org/web/eng/siteeng0.nsf/iwpllist133/E02D32D1A4976030C1256FEB005007A1>>.

²⁰⁰⁶ See M. A. Rogoff & E. Collins Jr., 'The *Caroline* Incident and the Development of International law', (1990) 16 *Brook. JIL*. 493.

²⁰⁰⁷ Letter dated 27 July 1842, from Daniel Webster to Lord Ashburton, *Brit. & For. State Papers*, Vol. XXX (1841-1842) pp. 193-194, extract from Webster's earlier letter to Henry S. Fox dated 24 April 1841, *Brit. & For. State Papers*, Vol. XXIX (1840-1841); see also John Bassett-Moore, 'A Digest of International Law', Vol. II (1906), at 412.

²⁰⁰⁸ For a detailed analysis of the developmental of this concept from Webster's letters into elements of customary international law, see J.A. Green, 'Docking the *Caroline*: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defence', 14 *Cardozo JICL* (2006), p. 429.

In terms of necessity, as long as the aggressor continues its attack against the sovereign state the principle of necessity is swept aside, unless the UN Security Council takes action to remove the need for self-defence. Surely it is in the national interest of the aforementioned state to be able to exercise self-defence as a means of protecting itself.²⁰⁰⁹ This is especially true in relation to the involvement of a NSAG as the main aggressor and in such cases the very life of the nation could be imperiled. Necessity is commonly interpreted when there is no non-forcible alternative response possible.²⁰¹⁰ This is a particularly critical criterion in the context of the use of force against NSAGs based in the neighboring state.²⁰¹¹ Since, it could be argued that in an inter-state conflict the assailed state could exhaust all diplomatic means and avenues prior to the use of force.²⁰¹² However, if one of the parties to the conflict is a NSAG, then such an option is not available.²⁰¹³ Of course, as the *last resort* the assailed state can try to persuade the territorial state to prevent these attacks continuing by exercising its authority and safeguard its territorial integrity.²⁰¹⁴ As in the case of Iraq over the last three decades, it has either been unable or reluctant to do so. As long as this option exists and has not been exploited, it could not be said that the requirement of necessity has been fulfilled.²⁰¹⁵

As Ago, Special Rapporteur of the International Law Commission points out:

The reason for stressing that action taken in self-defence must be necessary is that the state attacked (or threatened with immediate attack, if one admits preventive self-defence) must not in the particular circumstances have had any means of halting the attack other than recourse to armed forces. In other words, had it been able to achieve the same result by measures not involving the use of the use of force, it would have no justification for adopting conduct which intervened the general prohibition against the

²⁰⁰⁹ Lubell, 'Extraterritorial Use of Force against Non-State Actors', *op. cit.*, p. 43.

²⁰¹⁰ See Dinstein, 'War, Aggression and Self-Defence', *op. cit.*, p. 233; Gazzini, 'The Changing Rules in the use of Force in international law', *op. cit.*, p. 144.

²⁰¹¹ M.N. Schmitt, 'Responding to Transnational Terrorism under *Jus ad Bellum*: a Normative Framework', in Schmitt & Pejic (eds.), 'International law and Armed Conflict: Exploring the Faultlines', Martinus Nijhoff, 2007, p. 171.

²⁰¹² See Oil Platform (Islamic Republic of Iran v United States of America) ICJ Report (2003), para 76 ('there is no evidence that the United States complained to Iran of the military activities of the platforms, ... which does not suggest that the targeting of the platform was seen as a necessary act'), see also Dinstein, 'War, Aggression and Self-Defence', *op. cit.*, p. 209-210.

²⁰¹³ Lubell, 'Extraterritorial Use of Force against Non-State Actors', *op. cit.*, p. 45.

²⁰¹⁴ M.N. Schmitt, 'Pre-emptive Strategies in international Law' (2003) 24 *Mich. JIL* 513, pp. 530-1; O. Schachter, 'The Lawful Resort to Unilateral Use of Force' (1985) 10 *Yale JIL* 291, p. 292.

²⁰¹⁵ Lubell, 'Extraterritorial Use of Force against Non-State Actors', *op. cit.*, p. 46.

use of armed force. The point is self-evident and is generally recognized; hence it requires no further discussion.²⁰¹⁶

The second component of the doctrine of necessity is the requirement of immediacy according to which the time gap between the initial attack and the recourse to self-defence is reasonably short.²⁰¹⁷ Immediacy means that there has to be a reasonable time lapse between the initial attack and the use of force in self-defence in response.²⁰¹⁸ Immediacy 'is thereby understood as referring to the temporal relation between the armed attack and the self-defence response.'²⁰¹⁹ The immediacy standard presented in the *Caroline* case of 'no moment for deliberation' has been described as too strict to be applied literally and it is more appropriate in the case of anticipatory self-defence rather than reacting after the initial armed attack has taken place.²⁰²⁰ It has been argued that 'while immediacy serves as a core element of self-defence, it must be interpreted reasonably.'²⁰²¹ State practice points to the fact that to take action in self-defence states may need time for deliberation as in the case of Argentine invasion of the Falkland Islands in 1981. Although, the UK asserted its right to self-defence immediately after the invasion on 02 April 1982, until the deployment of the British forces (due to the distance from the UK) and the beginning of the hostilities several weeks had lapsed.²⁰²² In theory, the Security Council was empowered by the UN Charter to step in and prevent any possibility of any forcible self-defence. However, this has been far from the reality and in many occasions the UN Security Council has been reduced to a mere bystander and has not been able to prevent escalation of armed conflict.²⁰²³ It was pointed out elsewhere that in the last six decades the Security Council has shown time and again a certain reluctance and inability to intervene and to identify the aggressor in a specific armed conflict mostly on the basis of political expediency.²⁰²⁴

²⁰¹⁶ R. Ago, 'The internationally wrongful act of state, source of international responsibility (part 1)' Addendum to the 8th report on state responsibility by the Special Rapporteur, 32nd session of the ILC (1980); UN Doc A/CN.4/318/Add. 5-7.

²⁰¹⁷ Gardam, 'Necessity, Proportionality and the Use of Force by States', *op. cit.*, p. 150-3.

²⁰¹⁸ Dinstein, 'War, Aggression and Self-Defence', *op. cit.*, p. 233.

²⁰¹⁹ Lubell, 'Extraterritorial Use of Force against Non-State Actors', *op. cit.*, p. 44; see also dissenting opinion of Judge Schwebel, *Nicaragua* Case, 14 ICJ Reports 1986, at 362-367.

²⁰²⁰ T. Frank, 'Editorial Comment: Terrorism and the Right of Self-defence', 95 *AJIL* 839 (2001), p. 840; Lubell, 'Extraterritorial Use of Force against Non-State Actors', *op. cit.*, p. 44.

²⁰²¹ T.D. Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy', *International Law and Armed conflict: Exploring Faultlines*, *op. cit.*, p. 113.

²⁰²² In the case of Falklands the lapse was not considered to invalidate the right to self-defence, see R. Higgins, 'The Attitude of Western States Toward Legal Aspects of the Use of Force' in A. Cassese (ed.), 'The Current Legal Regulations of the Use of Force', Martinus Nijhoff, 1986, 435-52; R. Holms, 'Falkland War (1982)' in the *Oxford Companion of Military History*, Oxford U.P., 2004.

²⁰²³ Lubell, 'Extraterritorial Use of Force against Non-State Actors', *op. cit.*, p. 44.

²⁰²⁴ Frank, 'Terrorism and the Right of Self-defence', *op. cit.*, p. 841;

Once forcible action in self-defence has taken place, the question that remains is what precise form it should take.²⁰²⁵ The proportionality criterion deals with the issue of how much force is permissible in self-defence even in the context of NSAGs based in the neighboring state.²⁰²⁶ According to international law, necessity is adjudged at the beginning of a defensive action whereas proportionality is observed as applying to the duration of the conflict. According to Gray those states that accept a right of anticipatory self-defence or self-defence against an accumulation of events will argue for a much wider scope of proportionality.²⁰²⁷ Although there is no built-in geographical limitation as far as proportionality is concerned, actions of self-defence should be kept to the areas of attack that they are intended to prevent.²⁰²⁸ This issue was raised in the British response to the invasion of Falkland Islands by the Argentine forces that an all-out attack upon the Argentine mainland, beyond the primary area of the conflict by the British forces would have been disproportionate.²⁰²⁹ Proportionality also means that the force used in self-defence should generally be proportionate to the gravity of the initial attack.²⁰³⁰ However, contrary to the proportionality standard in the IHL, ‘one must look at the force used in self-defence as a whole, rather than assessing each incident or attack individually’.²⁰³¹ A final factor concerns the choice of targets of the defensive action.²⁰³² According to Ruys:

... The use of force must not only comply with the relevant rules of international humanitarian law (IHL), but must be adequate for the repelling of an armed attack. For this reason, it is not sufficient that the target is a legitimate military objective; it must also be connected with the force to be repelled.²⁰³³

Hence, the exercise of self-defence must specifically target the source of the armed attack and not against the infrastructure and civilians of the state on whose territory the NSAG operates.

²⁰²⁵ Lubell, ‘Extraterritorial Use of Force against Non-State Actors’, *op. cit.*, p. 63.

²⁰²⁶ It is often referred to as ‘the essence of self-defence’, see Brownlie, ‘International Law and the Use of Force by State’, *op. cit.*, p. 279.

²⁰²⁷ Gray, *International Law and the Use of Force*, *op. cit.*, p. 150.

²⁰²⁸ *Armed Activities* [2005] ICJ 147 <www.icj-cij.org>; C. Greenwood, ‘Self-Defence and the Conduct of International Armed Conflict’ in Y. Dinstein, (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) pp. 273-4.

²⁰²⁹ R. Higgins, ‘Problems and Process: International Law and How We Use it’, Clarendon Press, 1995, p. 232.

²⁰³⁰ Proportionality is often interpreted as requiring that the defensive force be of the same intensity as the offensive force to which it is responding. For an overview of the requirement that force be proportionate in the self-defence context, F.L. Kirgis, ‘Some Proportionality Issues Raised by Israel’s Use of Armed Force in Lebanon’ (ASIL Insight, 17 August 2006) <<http://www.asil.org/insights060817.cfm>>.

²⁰³¹ T. Ruys, ‘Crossing the Thin Blue Line: An Inquiry into Israel’s Recourse to Self-Defence against Hezbollah’, 43 *Stan. JIL* 265 (2007), p. 290.

²⁰³² A. Constantinou, ‘The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter’, Bruylant, 2000, p. 170.

²⁰³³ T. Ruys, ‘Armed Attacks and Article 51 of the UN Charter: Evolutions in Customary Law and Practice’, Cambridge U.P., 2010, p. 108.

In the *Oil Platform* case, the US argued that the Iranian oil platforms constituted a legitimate target in self-defence since evidence showed that the platform collected intelligence regarding the passing vessels, acted as a military communication post coordinating Iranian Navy and served as actual bases to launch helicopter and small boat attacks on neutral commercial shipping.²⁰³⁴ Although, Iran admitted that some military personnel and equipment had been present on the platform, it stressed that their presence was a purely defensive measure.²⁰³⁵ However, the ICJ did not find the evidence submitted by the US convincing enough and held that the oil platform was not a legitimate target.²⁰³⁶

4.9.7 The practice of states and the level of state support

Even at the height of the Cold War there was evidence of state practice in which states regularly used force against NSAGs mounting cross-border guerrilla activities on their territory based on another state's territory (more often than not a neighboring state).²⁰³⁷ The law of self-defence in its classical meaning only allows states to act in self-defence against another state or in the case of NSAGs if they are substantially involved with a state.²⁰³⁸ Therefore, one of the most important factors of assessing the legitimacy of the use of force against NSAGs is the level of support granted to such organizations from the state from whose territory they launch their attacks. Under customary international law a state is allowed to defend itself against aggression emanating from the territorial sovereignty of another state as long as certain conditions were met. Firstly, that it is acting in self-defence; secondly, the attack is of grave nature (not an isolated incident); thirdly, the offending nation is complicit, unwilling, or unable to prevent further attacks; and finally, the attack is extensive and impending.²⁰³⁹ The state involvement has been categorized in three different ways.²⁰⁴⁰ Firstly the active support by a state to a NSAG which 'aided and abetted' them in the shape of providing training facilities, arming and tactical advice. This was indeed the most commonly used reasoning invoked by states against 'indirect military aggression'.²⁰⁴¹ This was the very justification for self-defence used by the French government when its troops attacked bases in

²⁰³⁴ ICJ, *Oil Platform Case*, para 74.

²⁰³⁵ Ibid.

²⁰³⁶ Ibid, para 75.

²⁰³⁷ I. Brownlie, 'International Law and the Activities of Armed Bands', (1958) 7 *ICLQ* 712, pp. 712-13; see also S.G. Kahn, 'Private Armed Groups and World Order' (1970) 32 *NYBIL*, pp. 32-37.

²⁰³⁸ Dinstein, 'War, Aggression and Self-Defence', *op. Cit.*, p. 224-5.

²⁰³⁹ R.A. Falk, 'Legal Order in a Violent World', Princeton, 1968.

²⁰⁴⁰ Ruys & Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence', *op. Cit.*, p. 292.

²⁰⁴¹ Lamberti-Zanardi, 'Indirect Military Aggression', *op. cit.*, p. 111.

Tunisia in 1958, that it alleged were being used by insurgents to launch attacks on its colonial territory in Algeria during the civil war there.²⁰⁴² Similarly, South Africa and Rhodesia (now Zimbabwe) cited state support for taking measures in self-defence against bases in the neighboring states, which they alleged were aiding and facilitating the operations of national liberation movements challenging their legitimacy.²⁰⁴³

The second category is the passive state support for NSAGs active on their territory in that the state concerned ‘knowingly harboring’ of armed groups, or the ‘unwillingness to prevent’ armed attacks.²⁰⁴⁴ The other known example of the alleged active support for insurgents was used by Israel, Portugal and the Apartheid regime in South Africa, prompting them to take defensive action against NSAGs operating from neighboring and other states.²⁰⁴⁵ A practice by Israel that persisted in the latter part of the twentieth century by attacking the PLO headquarters and alleged military bases in Tunisia in 1985,²⁰⁴⁶ and the first decade of the twenty-first century against the southern Lebanese NSAG, Hezbollah in 2006.²⁰⁴⁷ In 1976, Israel in rescuing its nationals from a hostage situation in Entebbe, Uganda, used the rationale that it relied on the narrow interpretation of Article 2(4) of the UN Charter as allowing it use of force due to the fact that the UN machinery was ineffective at the time.²⁰⁴⁸ Portugal throughout the 1960s and 70s, was accused by Guinea, Senegal and Zambia of armed invasions of part of their territories in what Portugal claimed its inherent right to self-defence against the so-called national liberation forces launching armed attacks on its colonial territories in Africa.²⁰⁴⁹ Significantly, both Israel and Portugal invariably accused the host states of being responsible for not preventing such armed attacks. In order to justify their action they felt the need to assert some degree of state involvement in the cross-border operations of the NSAGs concerned.²⁰⁵⁰

The third level of connection between states and NSAGs relates to states that due to their weakness or lack of authority could not prevent their national territory from being used by NSAGs to launch armed attacks upon other states. It has been noticed that Israel was the first

²⁰⁴² (1958) *UNYB*, pp. 77-78.

²⁰⁴³ (1976) *UNYB*, p. 164; (1979) *UNYB*, p. 221; (1980) *UNYB*, p. 264; (1982) *UNYB*, p. 312-313; (1984) *UNYB*, p. 181; (1987) *UNYB*, p. 168; (1981) *UNYB*, p. 218; and (1986) *UNYB*, p. 162.

²⁰⁴⁴ Ruys & Verhoeven, ‘Attacks by Private Actors and the Right of Self-Defence’, *op. cit.*, p. 292.

²⁰⁴⁵ Gray, ‘International Law and the Use of Force’, *op. Cit.*, p. 137-138.

²⁰⁴⁶ (1985) *UNYB*, pp. 285-291.

²⁰⁴⁷ E.g. Y. Ronen, ‘Israel, Hezbollah, and the Second Lebanon War’, *YBIHL*, Vol. 9, 2006, pp. 362-393.

²⁰⁴⁸ SC 1942nd meeting (1976), para 102; 1976 *UNYB* 315.

²⁰⁴⁹ E.g. 1966 *UNYB* 117, 122; 1967 *UNYB* 123, 131; 1968 *UNYB* 159; 1969 *UNYB* 135, 137, 140; 1970 *UNYB* 187, 191, 192; 1971 *UNYB* 113, 116, 119, 121; 1972 *UNYB* 136; 1973 *UNYB* 109. See also Alexandrov, ‘Self-Defence against the Use of Force in International Law’, *op. Cit.*, p. 179.

²⁰⁵⁰ Gray, ‘International Law and the Use of Force’, *op. Cit.*, p. 137.

state to use this legal justification as the basis for its use of armed force in self-defence specifically regarding her neighbors such as Lebanon in the early 1970s and 1980s, mainly due to a weak central Lebanese government that was unable to stop NSAGs launching armed attacks on Israeli territory.²⁰⁵¹ Consequently, Israel asserted that if the aforementioned neighboring states were unable or unwilling to stop such activities, it would resort to the use of armed force in self-defence.²⁰⁵² It is worth noting that since its creation in 1948, Israel has been beset by political controversy in some quarters within the international community accusing it of illegal occupation of certain territories namely the Palestinian territories under its control.²⁰⁵³ Israel since the 1960s and 70s has launched attacks in what it claims to be in exercise of its right to self-defence against military bases of NSAGs (such as *inter alia* the PLO) located in neighboring Arab states;²⁰⁵⁴ in particular Lebanon in 1967, and Jordan in 1968,²⁰⁵⁵ the two countries Israel held responsible for not preventing armed attacks emanating from their territories. At the time, Israel was unanimously condemned by the Security Council.²⁰⁵⁶ Therefore, many states did not consider Israel's claim to the use of force against such NSAGs as acceptable and lawful.²⁰⁵⁷

The continuation of this policy by states mainly stems from the approach adopted by the ICJ in the *Nicaragua* case, in which the ICJ held that, in principle self-defence is permissible against irregular forces (NSAGs) in situations where there is substantial state involvement in the sending of those forces.²⁰⁵⁸ But claims by South Africa, Portugal and Israel to be acting in self-defence were never accepted by the UN Security Council.²⁰⁵⁹ South Africa also tried to rely on the novel doctrine of 'hot pursuit', a doctrine borrowed from the law of the sea in that it is within the rights of the coastal states to pursue a vessel guilty of offences in their territorial waters beyond their national jurisdiction.²⁰⁶⁰ Analogous to this South Africa

²⁰⁵¹ (1978) *UNYB* 297; (1980) *UNYB* 349; and (1984) *UNYB* 288.

²⁰⁵² *Ibid.*

²⁰⁵³ Many states within the international community regarded the occupation of the West Bank, Gaza, Golan heights, and until 2000 areas of South Lebanon as illegal.

²⁰⁵⁴ E.g. (1970) *UNYB*, p. 229, (1971), *UNYB*, p. 178.

²⁰⁵⁵ (1968) *UNYB*, p. 191.

²⁰⁵⁶ See UN Doc. S/8470 and S/8475, 23 SCOR, Supp. For January-March 1968, at 267-69; (1969) *UNYB*, p. 200; see also S.A. Alexandrov, 'Self-Defence against the Use of Force in International Law', Kluwer Law International, 1996, p. 174.

²⁰⁵⁷ Barsotti, 'Armed Reprisals', in Cassese (ed.), 'The Current Legal Regulation of the Use of Force', *op. cit.*, p. 79; see also Gray, 'International Law and the Use of Force', *op. cit.*, p. 234.

²⁰⁵⁸ Gray, 'International Law and the Use of Force', *op. Cit.*, p. 138.

²⁰⁵⁹ *Ibid.*

²⁰⁶⁰ N.M. Poulantzas, 'The Right of Hot Pursuit in International Law', Martinus Nijhoff Publishers, 2nd ed., 2002, p.12; see also Bowett, 'Self-Defence in International Law', *op. cit.*, pp. 82-86.

claimed the right to follow members of NSAGs into neighboring states.²⁰⁶¹ The international community was unequivocal in rejection of this doctrine and in Resolution 568, the Security Council stated that it ‘denounces and reject racist South Africa’s practice of “hot pursuit” to terrorize and destabilize Botswana and other countries in southern Africa’. As a reaction to this, in line with the practice by Israel and Portugal, South Africa adopted the same argument that of the host states’ responsibility from whose territory NSAGs were operating from, for justification of its exercise of the use of force in self-defence.²⁰⁶² Since the adoption of the UN Charter, it has been accepted that “armed attacks” included attacks by NSAGs for which states shared a certain degree of responsibility.²⁰⁶³ However, this is due to political considerations rather than on legal grounds, since according to Gray ‘these claims to self-defence were undermined by the fact that the states invoking self-defence were regarded as being in illegal occupation of the territory they were purporting to defend.’²⁰⁶⁴

The basis of the use of force in self-defence by Portugal on the other hand was to protect its colonial territories, a claim which was met with international condemnation in the light of Portugal’s complete breach of the doctrine of self-determination of peoples and its resultant process of decolonization. In the case of the Apartheid regime in South Africa not many states were prepared to accept her claim to self-defence because of its illegal occupation of Namibia and the fact that claims were made against incursions by SWAPO fighters seeking the liberation of Namibia.²⁰⁶⁵ The abovementioned examples were heavily influenced by the Cold War political considerations. However, in the post-Cold War period, accusations of active state support for NSAGs has remained the most plausible justification for the use of force in response to NSAGs.²⁰⁶⁶ Since then however, there have been many high profile incidences of cross-border attacks by a variety of NSAGs in the shape of irregular forces, which have prompted states to invoke their inherent right to self-defence according to Article 51 of the Charter and on the basis of suffering an armed attack.

²⁰⁶¹ (1976) *UNYB*, p. 164; (1979) *UNYB*, p. 221; (1980) *UNYB*, p. 264; (1982) *UNYB*, p. 312-313; (1984) *UNYB*, p. 181; (1987) *UNYB*, p. 168; (1981) *UNYB*, p. 218; and (1986) *UNYB*, p. 162; see also I. Brownlie, ‘International Law and the Activities of Armed Bands’, *op. cit.*, p. 734.

²⁰⁶² See E.K. Kwakwa, ‘South Africa’s May 1985 Military Incursions into Neighbouring African States’, 12 *Yale JIL* (1987) 421.

²⁰⁶³ See I. Brownlie, ‘The Use of Force in Self-Defence’ (1961) 37 *BYBIL* 245.

²⁰⁶⁴ Gray, ‘International Law and the Use of Force’, *op. cit.*, p. 138.

²⁰⁶⁵ *Namibia Advisory Opinion*, ICJ Reports (1971) 16.

²⁰⁶⁶ Ruys & Verhoeven, ‘Attacks by Private Actors and the Right of Self-Defence’, *op. Cit.*, p. 294.

In recent decades, there have been many examples of states justifying their use of force against NSAGs under the pretext of self-defence.²⁰⁶⁷ The following is evidence of the state practice in which the right of self-defence has been used as a pretext to justify the use of force in response to armed attacks instigated by NSAGs. As retaliation to the US Embassy Bombings in Kenya and Tanzania in August 1998 and in conformity with Article 51 of the UN Charter, the US administration launched bombing raids on a pharmaceutical plant in Sudan reportedly belonging to Al-Qaeda and its training camps in Afghanistan.²⁰⁶⁸ In 2002, Georgia complained to the Security Council of Russia's attack upon its territory that it regarded as 'barefaced aggression' in violation of its sovereignty and territorial integrity.²⁰⁶⁹ On its part, Russia denied such allegation, in spite of the fact that the incursions were independently verified by the Organization for Security and Co-operation in Europe (OSCE) observers.²⁰⁷⁰ However, a year later, Russia also indicated that it might seek authorization of the UN in order to invoke Article 51 of UN Charter to take action against Chechen fighters based in the Pankisi Gorge, a part of the Georgian territory that the central government was apparently unable to exercise effective authority.²⁰⁷¹

In 2006 Israel invoked the right to self-defence as a reaction to missile attacks launched by Hezbollah, the NSAG based in southern Lebanon, informing the Security Council Israel stated that it: 'reserves the right to act in accordance with Article 51 of the Charter of the United Nations and exercise of its right to self-defence when an armed attack is launched against a member of the United Nations.'²⁰⁷² Nevertheless, it is important to point out that Israel in justification of its actions deemed it necessary to hold Lebanon responsible for the

²⁰⁶⁷ See an excellent assessment of current state practice in regard to Self-defence see R. Van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: a Step Forward?', *LJIL*, 23 (2010), pp. 183-208.

²⁰⁶⁸ Prior to the invasion of Afghanistan by the US and its allies, Al-Qaeda was based there under the auspices of *de facto* government of Taliban; there were also allegations of Sudan harbouring Al-Qaeda forces on its territory; letter to the Security Council, 20 August 1998, S/1998/780; The attacks on Afghanistan and Sudan, see 'Legal aspects of International Political Relations', (1998) 52 *Yearbook of the United Nations*, pp. 1209 & 1219-20; President Bill Clinton, *Address to the Nation on Military Action Against Terrorist sites in Afghanistan and Sudan*, 20 August 1998, in 93 *AJIL* (1999) 161; see also Lobel, 'The Use of Force to Respond to Terrorist Attacks: the Bombing of Sudan and Afghanistan', *op. cit.*, 'Clinton Defends Military Strikes', BBC, 20 August 1998, available at: <<http://news.bbc.co.uk/2/hi/africa/155252.stm>>

²⁰⁶⁹ See e.g. UN Doc S/2002/250, 8 March 2002; UN Doc S/2002/950, 23 August 2002; UN Doc UN Doc S/2002/1033; 15 September 2002; UN Doc S/2002/1035, 13 September 2002.

²⁰⁷⁰ K.N. Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors' (2007) 56 *ICLQ* 141, p. 154-55; Ruys, 'Armed Attacks and Article 51 of the UN Charter', *op. cit.*, p. 465.

²⁰⁷¹ *Keesing's Record of World Events* (2002) 44951-52; UN Doc S/2002/1012; UN Doc S/2002/854, 31 July 2002; see also L. Moir, 'Reappraising the Resort to Force: International Law, *Jus ad Bellum* and the War on Terror', Hart Publishing, 2010, p. 144.

²⁰⁷² Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary General and the President of the Security Council A/60/937-S/2006/515.

actions of Hezbollah on the basis that Hezbollah was part of the coalition government ruling Lebanon and accordingly, it was the responsibility of that state to control the activities of one of its coalition members.²⁰⁷³ The question of whether Hezbollah is a terrorist organization is of importance in the legal assessment of whether the exercise of the right of self-defence by Israel against that organization is legal within the current framework of international law. As can be observed from previous examples, the international community tends to soften its attitude towards self-defence if there is a clear evidence of persistent terrorist activities.²⁰⁷⁴ Still, Israel opted to pin the blame firmly on the Lebanese government, a line of argument which provides extra credence to the approach traditionally adopted by the UN and the international community as a whole. In 2008 the Colombian Air Force launched an attack on a guerrilla camp belonging to the Revolutionary Armed Forces of Colombia (FARC) just inside the Ecuadorian territory under the pretext of a “legitimate exercise of self-defence”.²⁰⁷⁵ In spite of the US guarded support for the operation, this military action by Colombia was censured by the majority of the Latin American countries that prompted the Organization of American State (OAS) to condemn it as: ‘a violation of the sovereignty and territorial integrity of Ecuador and of principle of international law.’²⁰⁷⁶ It can be deduced from the above examples that although the ICJ has yet to address attacks instigated by NSAGs as a free-standing concept but the state practice points to the fact that such entities might be behind armed attacks, which would invoke the right to self-defence.

4.9.8 State responsibility

The ICJ has specifically examined the rules related to state responsibility for the activities of NSAGs in the *Nicaragua* and the *Iran Hostages* cases, and later by the ICTY in the *Tadic*

²⁰⁷³ Indeed Hezbollah was a minority party in the Lebanese cabinet, where it held two ministerial portfolios (Energy & Water, and Labour). Ruys, ‘Crossing the Thin Blue Line: An Inquiry into Israel’s Recourse to Self-Defence against Hezbollah’, *op. cit.*, p. 276.

²⁰⁷⁴ Y. Shiryayev, ‘The Right of Armed Self-Defence in International Law and Self-Defence Arguments used in the Second Lebanon War’, 3 *ACTA SOCIETATIS* (2007/2008) 80-97, p. 89.

²⁰⁷⁵ T. Waisberg, ‘Colombia’s use of force against non-state actors’, ASIL Insight No. 17, 22 August 2008 www.asil.org/insights080822.cfm; 1 March 2008, see ‘Colombia’s cross-border strike on FARC irks neighbors’, Christian Science Monitor, 3 March, available at <www.csmonitor.com/2008/0303/p04s02-woam.html>. A statement of the Colombian Foreign Ministry said that ‘Colombia did not violate sovereignty but acted according to the principle of legitimate defense’. See also ‘FARC Aura of Invincibility Shattered’, BBC, 01 March 2008, available at: <<http://news.bbc.co.uk/2/hi/americas/7273320.stm>>

²⁰⁷⁶ Permanent Council of the OAS, OAS Doc CP RES 930 (1632/08).

case.²⁰⁷⁷ In the *Nicaragua* case the ICJ held that a state must exercise “effective control” over the operation of a NSAG in order for the act of the group could be attributed to the state. Since even ‘financing, organizing, training, supplying, equipping’ and ‘the selection of its military and paramilitary targets and the planning of the whole of its operation’ is not enough to meet the threshold.²⁰⁷⁸ Nevertheless, the ICTY in the *Tadic* case reached the conclusion that the “effective control” test set in the *Nicaragua* case was set too high as a threshold for holding a state responsible for acts of NSAGs. The majority in the *Tadic* case held that it is sufficient that a state has ‘a role in organizing, coordinating, or planning the military actions of the military group’ to be in “overall control” over these NSAGs.²⁰⁷⁹ It is worth noting that both “control” and the “acknowledgement” tests for state responsibility were included in the International Law Commission’s Articles on Responsibility of States for International Wrongful Acts.²⁰⁸⁰ According to Draft Article 8, ‘the conduct of a person or a group of persons shall be considered an act of a state if the person or group of persons is in fact acting on the specific instructions of the state or is under the direction or control of the state in carrying out the conduct.’ In the opinion of the ICJ the acid test is the existence of “effective” control or direction.²⁰⁸¹ The other important point to be made is where a state explicitly acknowledges and adopts conduct by non-state actors as an extension of its own organs.²⁰⁸² The ICJ in the *Iran Hostages* case held that although the ‘direct’ responsibility of Iran for the original takeover of the US embassy in Tehran could not be proven,²⁰⁸³ but subsequent statements of support by the Iranian government for the hostage takers created liability on the part of the state. In other words, the ICJ suggested as in this case, a different possibility for the actions of NSAGs to be accountable to a state if the state in question acknowledges and adopts such actions *ex post facto*.²⁰⁸⁴

²⁰⁷⁷ ICJ Reports 1986, *Nicaragua*; ICJ Reports 1980, *Case Concerning the United States Diplomatic and Consular Staff in Tehran, United States v Iran*, Judgement of 24 May 1980; ICTY, *Prosecutor v Dusko Tadic*, Judgment Case no. IT-94-1-A, 15 July 1999.

²⁰⁷⁸ *Nicaragua*, para 115.

²⁰⁷⁹ ICTY, *Tadic*, para 137.

²⁰⁸⁰ Draft Articles 8 and 11, in UN General Assembly Resolution 56/83, Annex (2001), also see J. Crawford, ‘the International Law Commission’s Articles on State Responsibility, 110-113, 121-123 (2002).

²⁰⁸¹ *Nicaragua Case, op. cit.*, paras 64-65, 86, 110-11.

²⁰⁸² This is according to Draft Article 11, that both conditions have to be fulfilled cumulatively.

²⁰⁸³ *Iran Hostages Case*, para 73.

²⁰⁸⁴ *Ibid*, para. 74..

4.9.9 Can NSAGs instigate an armed attack?

Nowadays, there is a considerable controversy in relation to whether attacks carried out by NSAGs qualify as “armed attacks” according to Article 51 of the Charter sufficient to trigger the right of self-defence.²⁰⁸⁵ In the past there were scholars who argued that the phrase ‘armed attack’ in Article 51 ‘regardless of the source’ can only mean an armed attack instigated by a state.²⁰⁸⁶ This traditional view is encapsulated by Ian Brownlie writing in 1963 that:

Since the phrase “armed attack” strongly suggests a trespass it is very doubtful if it applies to the case of aid to revolutionary groups and forms of annoyance which do not involve offensive operations by the forces of a state. Sporadic operations by armed bands would also seem to fall outside the concept of “armed attack.”²⁰⁸⁷

In recent decades, however, the most pressing question for the international community in relation to legality of use of force in self-defence has been focused on the issue of cross-border activities of NSAGs in the shape of irregular forces launching attacks from the safe haven of another state. The additional question that arises is what degree of state involvement if any is necessary for it to be considered an armed attack due to NSAGs lacking *ratione personae* in international law.²⁰⁸⁸ Traditionally, for a state to claim the right to self-defence, it must have suffered an armed attack of grave level upon its territory by another state, characterized by territorial intrusions, human casualties as well as considerable destruction of property beyond that of the use of force *simpliciter*.²⁰⁸⁹ The ICJ, held that occupation of the US embassy and consular premises in Tehran by the hardline Iranian students amounted to an armed attack,²⁰⁹⁰ ‘even if it is not certain that the Court intended to equate it with the term “armed attack” under Article 51.’²⁰⁹¹ The ICJ in the *Nicaragua* case used the *definition of aggression* to acts committed by regular armed forces across an international border, but also ‘the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries,

²⁰⁸⁵ See Muge Kinacioglu, ‘A Response to Amos Guiora: Reassessing the Parameters of Use of Force in the Age of Terrorism’, *JCSL* (2008), Vol. 13 No. 1, 33-48.

²⁰⁸⁶ See e.g. O. Schachter, ‘The Lawful Use of Force by a State against Terrorist in Another Country’, 19 *IYHR* 209, 216 (1989).

²⁰⁸⁷ I. Brownlie, ‘International Law and the Use of Force by States’, p. 278-79; see also Quincy Wright, *Intervention*, 1956, 51 *AJIL* 257, 271 (1957); *FOG OF LAW*, p. 542.

²⁰⁸⁸ Brownlie, ‘International Law and the Activities of Armed Bands’, *op. cit.*, p.712.

²⁰⁸⁹ According to Constantinou: “The provision in Article 51 in conjunction with Article 2(4) connotes that there is a difference in the level of a use of force *simpliciter* and a use of force that amounts to an armed attack”; A. Constantinou, ‘The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter’, Brussels, Bruylant, 2000, p. 57.

²⁰⁹⁰ ICJ Reports 1980, para 29.

²⁰⁹¹ Ronzitti, ‘The Expanding Law of Self-Defence’, *op. cit.*, p. 350.

which carry out acts of armed force of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular armed forces, or its substantial involvement therein'.²⁰⁹² However, the ICJ did not elucidate on the precise meaning of 'substantial involvement.' The *travaux préparatoires* of the resolution indicates that logistical support and a fortiori the harboring or tolerating of NSAG's actions was considered inadequate.²⁰⁹³ In other words, the ICJ in the above case was primarily concerned with whether there was a state involvement which subsequently gives rise to the right of self-defence rather than considering a stand-alone action of a NSAG that would amount to an armed attack.

As discussed earlier, the language of this provision provides a clear exception to the proscription of Article 2(4) in which use of force is allowed in self-defence in reaction to an armed attack. Unlike other Articles in the UN Charter, Article 51 does not stipulate specifically the nature of the entity that commits the offending armed attack and the fact that it should necessarily be a state.²⁰⁹⁴ Hence, it could be argued that by implication an armed attack could be perpetrated by NSAGs.²⁰⁹⁵ Moreover, there is also nothing in the *travaux préparatoires* of the charter to indicate that meaning of 'armed attack',²⁰⁹⁶ nor does the text of Article 51 limit the extent of "armed attacks" to the acts of state agents.²⁰⁹⁷ It has been argued by some that due to the predominance of inter-state conflicts and the state-centric nature of international law this may have seemed to the drafters of the Charter as self-evident in 1945.²⁰⁹⁸ With the two World Wars as the backdrop, the drafters envisaged large-scale attacks by the regular forces of one state against another rather than attacks by NSAGs.²⁰⁹⁹ Undoubtedly, the most important aspect of Article 51 is that, for a state to act in self-defence it must have suffered (or some argue about to suffer) an armed attack upon its territory.²¹⁰⁰ The notion of an armed attack according to the Charter has been interpreted as a *qualitatively grave use of force*. In the *Nicaragua* case the ICJ has famously distinguished between 'less grave' and 'the most grave form of the use of force'. In the context of Article 51.²¹⁰¹ This is also apparent from the reference of the ICJ to the definition of aggression,

²⁰⁹² The Definition of Aggression, *op. cit.*, Article 3(g); *Nicaragua, op. cit.*, para 195.

²⁰⁹³ Ruys, 'Armed Attacks and Article 51 of the UN Charter', *op. cit.*, p. 486.

²⁰⁹⁴ See S.D. Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter', 43 *Har.ILJ* 41, p. 50.

²⁰⁹⁵ D. Janse, 'International Terrorism and Self-Defence', 36 *IYHR* 149 (2006), p. 166.

²⁰⁹⁶ J. Gardam, 'Necessity, Proportionality and the Use of Force by States', Cambridge U.P., 2004, p. 142.

²⁰⁹⁷ Dinstein, 'War, Aggression and Self-defence', *op. cit.*, p. 224-5.

²⁰⁹⁸ I. Brownlie, 'International Law and the Use of Force by States', *op. cit.*, p. 278.

²⁰⁹⁹ T. Ruys, 'Armed Attack and Article 51 of the UN Charter', Cambridge U.P., 2010, 514-15.

²¹⁰⁰ Ronzitti, 'The Expanding Law of Self-Defence', *op. cit.*, p. 350.

²¹⁰¹ *Nicaragua, op. cit.*, para 191; this statement was also reiterated in the *Oil Platform Case*, Merits, ICJ Rep. (2003), p. 161, para 51.

adopted by the UN General Assembly in 1974,²¹⁰² that the ICJ regarded as ‘to reflect customary international law’²¹⁰³, and used it as a benchmark to establish the existence of an armed attack.²¹⁰⁴ Consequently, gravity of the conflict has to reach a *de minis* threshold stipulated in Articles 2 and 3(g) of the aforementioned definition of aggression, an approach justified in the light of state practice.²¹⁰⁵ According to Gray ‘states do not today challenge the view that actions by irregulars can constitute armed attack; the controversy center on the degree of state involvement that is necessary to make the actions attributable to the state and to justify action in self-defence in particular cases’.²¹⁰⁶

As discussed earlier, there exists a school of thought that an armed attack can only take place if instigated by a state and the right to self-defence can only be invoked by an attack by a state or the NSAG acting on behalf of one.²¹⁰⁷ This view was propagated by the ICJ in the *Nicaragua* case in which it held that there has to be a correlation between an armed attack instigated by a NSAG and its involvement with a state rather than dealing with the issue of an armed attack initiated by a NSAG as a free-standing concept. The decision in the *Nicaragua* case has subsequently been heavily criticized mostly by Anglo-Saxon scholars who regretted the fact that the Court limited the permitted self-defence to cases where the NSAG had been sent by another state hence leaving afflicted states no room for protection.²¹⁰⁸ Further, in the opinion of the present author it is not safe to rely completely on the *Nicaragua* judgment since the ICJ in that case was concerned *inter alia* with the support of the Sandinista regime for the rebels fighting the El Salvador government and to what degree this involvement with the rebels amounted to an armed conflict, thus, triggering the right to self-defence against

²¹⁰² The UN General Assembly’s Definition of Aggression, Provides in Article 3(g) that “[t]he sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of *such gravity* as to the acts listed above, or its substantial involvement therein” amounts to an act of aggression (emphasis added). The definition is annexed to UN General Assembly Resolution 3314 (XXIX), Annex, 2319th plen. Mtg., UN Doc. A/Res/3314 (XXIX)(Jan. 1, 1975).

²¹⁰³ *Nicaragua, op. cit.*, para 103.

²¹⁰⁴ *Nicaragua, op. cit.*, para 195; since then the ICJ has also relied upon the definition of aggression in *DRC v Uganda*, to ascertain whether the Ugandan invasion of the eastern province of DRC satisfied the standard of self-defence, *DRC v Uganda, op. cit.*, para 146.

²¹⁰⁵ Definition of Aggression, *op. cit.*, Articles 2 & 3(g); Gray, ‘International Law and the Use of Force’, *op. cit.*, p. 130.

²¹⁰⁶ Gray, ‘International Law and the Use of Force’, *op. Cit.*, p. 109.

²¹⁰⁷ This is often referred to as ‘indirect military aggression’ in which a NSAG act as *de facto* organ of a sovereign state and the use of armed force is indirect and secret, Lamberti-Zanardi, ‘Indirect Military Aggression’, p. 111; Lubell, ‘Extraterritorial Use of Force against Non-State Actors’, Oxford U.P., 2010, p. 31.

²¹⁰⁸ See dissenting opinion of Judge Jennings, *Nicaragua, op. cit.*, para 543, dissenting opinion of Judge Schwebel, para 131-3; J.M.N. Moore, ‘the Secret War in Central America and the Future of the World Order’ (1986) 80 *AJIL* 43; J.L. Hargrove, ‘the Nicaragua Judgment and the Future of the Law of Force and Self-defence’ (1987) 81 *AJIL* 135, p. 139.

Nicaragua.²¹⁰⁹ However, in regard to legality of use of force against NSAGs, the position maintained by the ICJ is understandable since as the very bastion of international law as a positivist legal system basically about the relations of states, perhaps it considers allowing the use of force against non-state actors without any other state's connection as providing states with a *carte blanche* to use force against such entities more liberally. Indeed, this conservative approach has been criticized even by certain Judges within the ICJ.²¹¹⁰

Following its decision in the *Nicaragua* case, the ICJ has considered the concept of armed attack, in the case of *Oil Platforms*,²¹¹¹ *Armed Activities on the Territory of the Congo (DRC v Uganda)*,²¹¹² and in brief and obscure passage in its Advisory Opinion on *the Legal Consequences of a Wall on the Occupied Palestinian Territory*.²¹¹³ In the latter, the ICJ adopted a very conservative approach in dealing with the issue of self-defence and kept clear of the most controversial issues in relation to NSAGs.²¹¹⁴ Nevertheless, the ICJ in the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Palestinian Territory* reiterated that 'Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of an armed attack by one state against another state'.²¹¹⁵ This line of reasoning was maintained albeit with less clarity by the ICJ in the case of *Democratic Republic of Congo v. Uganda*²¹¹⁶ in which the Court again was principally considering whether the armed attacks could be attribute to the Democratic Republic of Congo and once it reached a negative conclusion, it did not deal with the potential claim of self-defence against NSAGs.²¹¹⁷ It held:

... The Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what

²¹⁰⁹ *Nicaragua, op. cit.*, para 131, 195, 229, 230.

²¹¹⁰ Judge Kooijmans and Judge Simma were unequivocal in their assessment of a new phenomenon "which in present day international relations has unfortunately become as familiar as terrorism," namely the complete absence of government authority in the whole or part of the territory of a state". Therefore, both were of the opinion that in such circumstances the most crucial aspect is the effect and gravity of the armed attack under consideration should be the objective criteria of applicability of Article 51. *DRC V Uganda, op. cit.* para 19-31 (Separate opinion of Judge Kooijmans), see also para 7-15 (separate opinion of Judge Simma).

²¹¹¹ *Iran v USA*, ICJ Reports (2003) 161.

²¹¹² ICJ Reports (2005) 168.

²¹¹³ ICJ Reports (2004) 3.

²¹¹⁴ Gray, 'International Law and the Use of Force', *op. Cit.*, p. 129.

²¹¹⁵ *The Wall, op. cit.*, p. 1050.

²¹¹⁶ *Case Concerning Armed Activities on the Territory of Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment of 19 December 2005, [2005] ICJ Reports 168, para 146-7.

²¹¹⁷ Lubell, 'Extraterritorial Use of Force against Non-State Actors', *op. cit.*, p. 33.

conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.²¹¹⁸

However, correctly in the opinion of the present author Judge Higgins in her separate opinion in the *Advisory Opinion on the Wall* notes that ‘there is with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a state.’²¹¹⁹ A similar line of argument was also expressed in the separate opinion of Judge Kooijmans and in the Declaration of Judge Buergenthal in which they expressed their disappointment in the manner in which the Court was unable to come to terms with the fact that indeed armed attacks can be perpetrated by NSAGs.²¹²⁰ Their position on this issue is also shared with a considerable number of scholars who are of the opinion that based on the factual evidence in recent decades an armed attack could be perpetrated by NSAGs and as a result invoking the right to self-defence under Article 51 of the UN Charter.²¹²¹ In his dissenting judgment in *DRC v. Uganda* Judge Kooijmans lamented the fact that the ICJ maintained the same line of reasoning that claims of self-defence can only be examined if there is a connection (directly or indirectly) to a state. This approach according to him was rather erroneous since:

... If attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim state from exercising its inherent right of self-defence ... If armed attacks are carried out by irregular bands from such territory against a neighboring state, they are still armed attacks even if they cannot be attributed to the territorial state. It would be unreasonable to deny the attacked state the right to self-defence merely because there is no attacker state, and the Charter does not so require.

In this regard, it is clear that the approach adopted by Judge Kooijmans is a fair reflection of the reality supported by state practice.²¹²² In recent decades many states have resorted to extraterritorial use of force under the pretext of self-defence against NSAG operating from the safe haven of another state. The aforementioned Caroline case which set the parameters

²¹¹⁸ *Democratic Republic of the Congo v. Uganda*, *op. cit.*, para 146-7.

²¹¹⁹ *The Wall*, *op. cit.*, para 1063; see also Dinstein, ‘War, Aggression and Self-Defence’, *op. cit.*, p. 229.

²¹²⁰ See separate opinion of Judge Kooijmans in *the Wall* case, para 35; also Declaration by Judge Buergenthal in *the Wall* case, para 6.

²¹²¹ C. Greenwood, ‘International Law and the Pre-emptive Use of Force: Afghanistan, Al Qaeda, and Iraq’, *op. cit.*, P. 17 (2003); T. Franck, ‘Editorial Comments: Terrorism and the Right of Self-Defence’, 95 *AJIL* 893, 840 (2001); Dinstein, ‘War, Aggression and Self-Defence’, *op. cit.*, p. 204-8; J. Paust, ‘Use of Armed Force Against Terrorist in Afghanistan, Iraq, and Beyond’, 35 *Cornell ILJ* 533, pp. 533-4 (2002).

²¹²² Ruys, ‘Armed Attack and Article 51 of the UN Charter’, *op. cit.*, p. 486.

of the right of self-defence under customary international law has been described as one of the first examples of attack instigated by a non-state entity. As Greenwood opines:

... The famous *Caroline* dispute, itself shows that an armed attack need not emanate from a state. The threat in the *Caroline* case came from a non-state group of the kind most would call terrorist today. The United States was not supporting the activities of that group and certainly could not be regarded as responsible for their act. Yet, in the correspondence or in the subsequent reliance on the Webster formula on self-defence is it suggested that this fact might make a difference and that the Webster formula might not apply to armed attacks that did not emanate from a state.²¹²³

It is quite apparent that even in the pre-Charter era the concept of self-defence as reaction to armed attacks perpetrated by NSAGs were recognized by states.²¹²⁴ Already in the Security Council in Resolutions 405 and 419 (1977) has referred to ‘an act of armed aggression’ instigated by mercenaries against the state of Benin, without alluding to any state involvement.²¹²⁵ Article 1 of the Abuja Non-Aggression and Common Defence Pact, adopted by the African Union specifically refers to aggression committed by the ‘non-state actors’.²¹²⁶ More recently, another important development in this regard is the adoption at the ICC Review Conference in Kampala in June 2010 of a resolution, amending the ICC Rome Statute by rendering explicit the ‘Element of Crime’ of the ‘crime of aggression’ and by identifying the different ways in which the International Criminal Court could in principle exercise jurisdiction over the crime.²¹²⁷ This also brings us to the issue of customary international law in relation to necessity, proportionality and immediacy (‘instant, overwhelming’, ‘no moment for deliberation’) as well as unavailability of other means (‘leaving no choice of means’) are clearly imbedded in the *Caroline* formula of self-defence.²¹²⁸ Higgins thus encapsulates the problem facing the challenge of dealing with NSAGs on their doorstep:

²¹²³ Greenwood, ‘International Law and the Pre-emptive Use of Force’, *op. cit.*, p. 17.

²¹²⁴ Lubell, ‘Extraterritorial Use of Force against Non-State Actors’, *op. cit.*, p. 35.

²¹²⁵ Security Council Resolution 405 and 419 (1977), 32 *RDSC* 18-19 (1977).

²¹²⁶ Abuja Non-Aggression and Common Defence Pact (2005), at 3-4; Dinstein, ‘War, Aggression and Self-Defence’, *op. cit.*, p. 227.

²¹²⁷ C. Kress & L. Von Holtendorff, ‘The Kampala Compromise on the Crime of Aggression’, 8(5), *JICJ*, 2010, 1179, pp. 1212-16.

²¹²⁸ On the abiding relevance of the *Caroline* formula, see N. Schrijver, ‘Responding to International Terrorism: Moving the Frontier of International law for “Enduring Freedom”’ (2001) 48 *NILR* 271-291, p. 281; on the validity of the *Caroline* principle could be found in the state reaction to the Israel attack on Osiraq nuclear reactor. Although the vast majority of the international community criticised the Israeli action and deemed it illegal, many states’ responses suggest that in the context of anticipatory action meeting the *Caroline* test could have been lawful. See e.g. UK House of Commons Foreign Affairs Committee, Foreign Policy Aspect of War against Terrorism, Second Report of Session 2002-03 (24 October 2002), at para 257.

By adopting the unsatisfactory definition in the General Assembly aggression resolution, and proclaiming it customary international law, the Court appears to have selected criteria that are operationally unworkable. When a state has to decide whether it can repel incessant low-intensity irregular military activity, does it really have to decide whether that activity is the equivalent of an armed attack by a foreign army-and anyway, is not any use of force by a foreign army entitled to be met by sufficient force to require it to withdraw? Or is that now in doubt also? Is the question of the level of violence by regular forces not really an issue of proportionality, rather than a question of determining what is an ‘armed attack’?²¹²⁹

4.9.10 Self-defence against armed attacks by NSAGs after the September 11

Since the end of the Cold War, the defining moment which dispelled any lingering doubts concerning application of Article 51 of the UN Charter to NSAGs was the unanimous outrage of the international community in the wake of the abhorrent attacks of 11 September 2001 on the World Trade Center and Pentagon.²¹³⁰ The atrocities were committed by the Al Qaeda terrorist organization operating within Afghanistan under the protection of its *de facto* government of Taliban.²¹³¹ Consequently, the aforementioned terrorist attacks led to a fundamental reappraisal of the law on self-defence especially in relation to NSAGs.²¹³² In spite of some backtracking by some traditionalist observers,²¹³³ it cannot be denied that even those who regard as problematic the categorization of terrorist action *quo* an armed attack (within the meaning of Article 51 of the UN Charter) would have to concede that the response of the international community to 9/11 has had a lasting influence on customary international law.²¹³⁴ In the aftermath of the 9/11 attacks, the UN Security Council adopted Resolution 1368 (2001)²¹³⁵ and in Resolution 1373 (2001),²¹³⁶ in which it is unequivocally reaffirmed ‘the inherent right of individual and collective self-defence in accordance with the Charter’, without specifically mentioning the expression “armed attack”.²¹³⁷ The significance of Security Council Resolution 1368 is that for the first time, it implicitly affirmed the right

²¹²⁹ Higgins, ‘Problems and Process: International Law and How We Use it’, *op. cit.*, p. 251.

²¹³⁰ Dinstein, ‘War, Aggression and Self-Defence’, *op. cit.*, p. 226.

²¹³¹ See UN Doc S/2001/946. See also ‘Contemporary Practice of the United States’, 96 *AJIL*, 2002, p. 237.

²¹³² Gray, ‘International Law and the Use of Force’, *op. cit.*, p. 193.

²¹³³ Ruys & Verhoeven, ‘Attacks by Private Actors and the Right of Self-Defence’, *op. cit.*, p. 311-12.

²¹³⁴ E.P.J. Myjer & N.D. White, ‘the Twin Towers Attack: an Unlimited Right to Self-Defence?’, 7 *JCSL* 5, pp. 7-9 (2002).

²¹³⁵ SC Res 1368 (2001), *RDSC* 290, 291.

²¹³⁶ SC Res 1373 (2001), *RDSC* 291.

²¹³⁷ Dinstein, ‘War, Aggression and Self-Defence’, *op. cit.*, p. 228.

of self-defence in response to terrorist attacks.²¹³⁸ Moreover, the North Atlantic Council (NATO) invoked Article 5 of the Washington Treaty, which states that ‘attacks on one or more of the Allies in Europe or North America shall be considered against them all.’²¹³⁹ This was followed by the Organization of American States (OAS) which according to the 1947 (Rio de Janeiro) Inter-American Treaty of Reciprocal Assistance stated that ‘these terrorist attacks against the United States of America are attacks against all American States.’²¹⁴⁰ Both the European Union and the Organization for Security and Cooperation in Europe (OSCE) accepted that the 11 September attacks amounted to an armed attack, giving the US the right to react in self-defence.²¹⁴¹ As a reflection of unanimity within the international community Russia, China and Japan all gave their unreserved support to military action.²¹⁴² Of course, the US invoked the right of self-defence in Article 51 of the Charter as the legal basis for its military operation *Enduring Freedom* against Al-Qaeda and its patron the Taliban the *de facto* government of Afghanistan, asserting:

‘In response to these attacks, and in accordance with the inherent right to individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.’²¹⁴³

As a consequence, the emerging debate is now somewhat erroneously concentrated on the right of self-defence by states (mainly the US and its allies) against transnational armed individuals (namely Al-Qaeda) who were seemingly being harbored by the so-called rogue states such as Afghanistan and Sudan and in recent years with no specific abode.²¹⁴⁴ Because of the nature and structure of Al-Qaeda as a NSAG this can be described as a very unique situation that cannot be replicated by any other NSAGs around the world. It is submitted that the events of 11 September 2001, committed by a unique trans-national organization namely

²¹³⁸ Gray, ‘International Law and the Use of Force’, *op. cit.*, 193; J.M. Beard, ‘America’s New War on Terror: the Case for Self-Defence under International Law’, 25 *Harvard Journal of Law & Policy* (2002) 559-590, p. 4.

²¹³⁹ It is worth noting that it was the only time that the collective right of self-defence under Article 51 has been invoked. North Atlantic Treaty Organization (NATO): Statement by the North Atlantic Council, 2001, 40 *ILM* 1267 (2001).

²¹⁴⁰ Organization of American States (OAS): Resolution on Terrorist Threat to the Americas, 2001, 40 *ILM* 1273, *ibid* (2001).

²¹⁴¹ Ronzitti, ‘The Expanding Law of Self-Defence’, *op. cit.*, p. 347.

²¹⁴² Keesing’s Record of World Events (2001) 4435-6, 44393.

²¹⁴³ Letter dated 7 October 2001 from John Negroponte the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/946. Although accusing Taliban of Acquiescence, the letter stopped short of alleging that the Taliban was directly responsible for the 9/11 terrorist attacks.

²¹⁴⁴ See J. Label, ‘The Use of Force to Respond to Terrorist Attacks: the Bombing of Sudan and Afghanistan’, *Yale JIL* 24 (1999), 537.

Al-Qaeda without a permanent base anywhere has provided a false perception regarding this vital issue.²¹⁴⁵ It is worth mentioning that the vast majority of UN members expressed their support for the military operation.²¹⁴⁶ Buoyed by this development, many states in recent years have taken advantage of an apparent assumption that there has been a broadening of the right of self-defence against NSAGs which launch cross-border attacks and are engaged in military operation against them.²¹⁴⁷

As observed above, the international community in the past has shied away from addressing the legality of the use of force against NSAGs particularly based in a neighboring state as free-standing concept. In spite of the ambiguous language of Article 51 of the UN Charter, purely 'private' attacks have been excluded from its remit.²¹⁴⁸ The ICJ on its part has so far adopted a restrictive approach to the issue. In fact, the highest Court in the world as we have observed has passed over many opportunities in recent cases to address the issue at hand. In the *Nicaragua* case, the ICJ acquiesced that Article 51 did apply as long as there existed a close nexus between the NSAGs with a state. However, in light of recent state practice as it has developed in the last quarter of a century and considerable number of military interventions against NSAGs support, a more liberal interpretation of Article 51 of the UN Charter is given.²¹⁴⁹ It has been observed that undeniably:

If we look *inter alia* at the US interventions in Afghanistan (1998 and 2001) and Sudan (1998), the Israeli intervention in Lebanon (2006) and the Turkish intervention in northern Iraq (2007-8), or at the *opinio juris* expressed by states such as the US, Russia, Australia, France, the Netherlands, Rwanda, Ethiopia and Iran, it is difficult to avoid the impression that both state practice and *opinio juris* have undergone important shifts since 1986, and especially since 2001.²¹⁵⁰

It is important to point out that even in occasions that states claim to have the right to self-defence against NSAGs somewhat curiously insist on establishing a link between the NSAG

²¹⁴⁵ Bassoon uses the term 'international terrorism' to describe international non-state terrorist organization such as *Al-Qaeda*, a relatively small and ideologically motivated group, whose strategies of terror violence are designed to propagate a political message, destabilize a regime, inflict social harm as political vengeance, and elicit over-reactive state responses likely to create a political crisis.' Significantly according to Bassoon, '[I]n its common usage, the term "international terrorism" has come to exclude the activities of state actors and even insurgent and revolutionary groups.' See M.C. Bassiouni, Legal Control of International Terrorism: a Policy Oriented Assessment', *Harvard ILJ* 43 (1) (2001), 83-103, p. 86.

²¹⁴⁶ 'International Peace and Security' (2001) 55 *Yearbook of United Nations* 45, 65-6.

²¹⁴⁷ Ruys & Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence', *op. cit.*, p. 298.

²¹⁴⁸ Ruys, 'Armed Attacks and Article 51 of the UN Charter', *op. cit.*, p. 485.

²¹⁴⁹ C.J. Tams, 'Swimming with the Tide, or Seeking to Stem it? Recent ICJ Rulings on the Law of Self-Defence', *Revue Québécoise de Droit International*, Vol. 18, No. 2, pp. 275-290, 2005, p. 289.

²¹⁵⁰ Ruys, 'Armed Attack and Article 51 of the UN Charter', *op. cit.*, p. 486.

and the state on whose territory the defensive measure has taken place.²¹⁵¹ Even more powerful states such as the US who exercise the doctrine of self-defence more readily are perfectly aware that ultimately they would have to find a connection between the harboring state and the NSAG based on its territory. Likewise, Israel in its conflict against Hezbollah made it absolutely clear that it held Lebanon ultimately responsible for the NSAG's aggression upon its territory.²¹⁵²

²¹⁵¹ Van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors' *op. cit.*, p. 200.

²¹⁵² A. Zimmermann, 'The Second Lebanon War: *Jus ad bellum*, *jus in bello* and issue of Proportionality', *Max Planck Yearbook of United Nations Law*, Vol. 11, 2007, 99-141, P. 106.

Conclusion

The aim of this study has been to outline and analyse the current legal framework of international law which endeavours to regulate the military activities of non-state armed groups (NSAGs), specifically in regards to Kurdish NSAGs since the end of World War I. It had as its main aim to establish whether the legal framework was sound in theory and applied in practice. It is the belief of the present author that the use of the Kurdish microcosm has provided a beneficial tool to illustrate any shortcomings or achievements of international law in dealing with NSAGs. A number of conclusions can be ascertained from the above analysis and a number of recommendations have been made thereon.

Until the nineteenth century the Kurds had been divided between the Ottoman Empire and the Persian Empires of Safavi and Qajar, all of which were known for their ethnic pluralism. The aforementioned empires ruled their Kurdish populations through a feudal system and a chain of semi-independent principalities. Since the end of World War I, the collapse of Ottoman Empire and the creation of the modern Middle East the Kurdish issue has been a permanent feature of international relations. The genesis of the Kurdish problem is traced back to 1920 Treaty of *Sevres* in which the Great Powers gave assurances to the Kurdish population of the former Ottoman empire of having the opportunity to establish their own independent state. Owing to the rise of Mustafa Kemal Ataturk, the Treaty of *Sevres* was never ratified. By the time the Treaty of Lausanne in 1923 (replacing the Treaty of *Sevres*) was ratified there were no provisions for an independent Kurdish state and the aspirations of achieving their right to self-determination were no longer attainable.

Hence, the Kurds found themselves under the hegemony of three nationalistic and militaristic regimes in Turkey, Iraq and Iran. The Kurds had to assimilate to a single identity imposed upon them. As a consequence of living under such regimes the Kurds had no legal recognition or protection according to the respective constitutions of those states. The Kurds were denied not only the right to establish an independent state, but to achieve even a measure of autonomy over their language and culture was a clear manifestation of denial of their right to self-determination, even within the existing borders. It is important to point out that the main obstacle in achieving a united Kurdistan has been the apparent division within different Kurdish communities spread over the three sovereign states. Over the last hundred years this disunion has been reinforced by the borders of their host states. The failure of

international law to accommodate Kurdish self-determination has resulted in continuous state repression, manifesting itself at times in systematic and gross violations of human rights.

In particular, the Kurdish population of Turkey suffered the harshest treatment under the Kemalist regime. The suppression of the Kurdish identity in Turkey has been a lot more virulent than experienced by the Kurds in Iraq and Iran. Inevitably, such suppression of Kurdish identity resulted in major armed revolts in the pre-1945 period in which the Kurds rose up against the authoritarian regimes resulting in many thousands of civilian casualties and forced mass migration of Kurdish populations. In some instances, which have been highlighted by the study, the actions taken by the states, tantamount to ethnic cleansing and genocide of the Kurdish population. Ever since, the concept of armed conflict has been synonymous with the Kurds and their relationship with their host states.

In the period prior to 1945 such armed revolts against central administrations were purely internal matters for the sovereign states and not the concern of international law. It is significant to point out that at the time in spite of their political and historical differences the three sovereign states worked in unison to thwart any Kurdish ambitions. The Treaty of Saadabad of 1937 is a manifestation of this unanimity between the states to ensure co-operation in tackling Kurdish armed revolts.

The study has established that prior to the creation of the United Nations and codification of international law in 1945, the sovereign states under consideration took military action against the Kurds with impunity. In the period prior to 1945, Kurdish NSAGs were based on hierarchical tribal structure invariably led by a prominent figurehead at the helm but crucially devoid of any clear political agendas.

In contrast, the Kurdish groups in the post-1945 era were at least in name left-wing but still organized heavily on tribal basis. The failure to establish a state by the Kurdish Mahabad republic of 1945-46, proved to the Kurds that in step with so many other NSAGs around the world they had to develop a political agenda as well as maintaining their military capabilities. As a consequence, they became much more organized structurally and politically. This is of great relevance since the end of World War II, NSAGs globally and in Kurdistan in particular, have been the most significant and prevalent non-state actors in contemporary politics and armed conflict. This manifested itself in the emergence of organizations such as

KDP and PUK in Iraq, KDP-I in Iran and in the latter part of the twentieth century the PKK in Turkey and its affiliate PJAK in Iran. All the above-mentioned organizations now pursue a dual strategy of political and military agendas.

The post-1945 era also heralded the emergence of the Cold War. At the height of the Cold War Kurdish NSAGs in Iraq and Iran were reduced to mere pawns in the super powers chess game. Both the Soviet Union and the United States pursued a policy of covert support and sponsorship for Kurdish NSAGs in some case pitting them against one another.

In order to trace the development of traditional international law in relation to NSAGs the concepts of rebellion, insurgency and belligerency were examined. Recognition of belligerency was the very first mandatory application of humanitarian standards to be applied to internal armed conflicts. Traditionally, the limited regulations of non-international armed conflicts were based on non-intervention in domestic jurisdiction of states in particular where their national sovereignty and political authority was at stake.

However, the Geneva Conventions of 1949 were the first international law instruments to specifically deal with ‘armed conflicts not of an international character’. Through Common Article 3, it substantially revised the formalistic and *de jure* approach of the recognition of belligerency, replacing it with a modern legal system to regulate the conduct of hostilities in both international and non-international armed conflict. Common Article 3, a somewhat minimalistic measure to deal with such conflicts, was the very by-product of this process. This was in spite of the recommendation of the International Committee of Red Cross in 1948 to adopt a single definition of armed conflict upon which the whole corpus of international humanitarian law (IHL) would be applicable, regardless of the dichotomy between international and non-international armed conflicts.

The Geneva Conventions of 1949 famously did not define ‘armed conflict’. Under the Geneva Conventions, an international armed conflict arises between ‘two or more of the High Contracting Parties’. According to Article 2, the Conventions are limited to application in war and armed conflict. Consequently, the existence of an armed conflict to this day depends very much by the facts on the ground rather than on a formal definition. Moreover, there is no independent body that could impartially determine the legal nature of an armed conflict, whether it is of international, non-international or merely a situation of civil disturbance.

This study has endeavoured to ascertain whether the so-called ‘internal’ armed conflicts involving Kurdish NSAGs frequently defy designation as purely internal matters. It is concluded that almost all of the armed conflicts taking place between the Kurdish NSAGs and their host states have been internal armed conflicts. This is significant since the very nature of the armed conflict in question determines the application of IHL. In other words, the conflicts in Kurdistan were purely civil wars in spite of the transnational nature of Kurdish NSAGs activities.

It is still a striking feature of internal armed conflicts and situations of lower intensity of internal strife that states enjoy the discretion of criminalizing both recourse to force and the conduct of hostilities by NSAGs. It is submitted that such NSAGs are heavily reliant on assistance of another state and without such support would not be able to survive. For years the PKK was supported, financed and harboured by Syria. Otherwise, it could not have been able to engage the Turkish army for such a long period. There is no question that all the Kurdish NSAGs under consideration have also enjoyed popular support within the communities they operate in. However, since the defeat of the PKK militarily in the middle of 1990s and its resort to urban terrorist tactics its popular support has somewhat dwindled.

The last twenty years has witnessed the law regulating internal armed conflict going through a remarkable revolution. Another major development in this regard is the recognition of serious violations of IHL amount to war crimes. This breakthrough came about as a result of the end of the Cold War and recognition by the international community that the commission of serious violations of humanitarian norms in internal armed conflicts entail individual criminal responsibility. This is mainly due to the significant contribution made by international judicial institutions such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and ultimately by virtue of the Statute of the International Criminal Court (ICC).

Notwithstanding the fact that there is still some ambiguity surrounding the precise determination of an internal armed conflict, it is submitted that a consolidated definition of internal armed conflict has taken shape. There is no question that in an internal armed conflict, Common Article 3 and customary law principles regulate internal armed conflicts within a state. In contrast, Additional Protocol II has not as yet attained customary status and

because of its high threshold of applicability and non-ratification by some of the major military nations such as the United States, Russia and Israel, it can be argued that the Protocol has lost its importance. Furthermore, none of the states of Turkey, Iraq and Iran have ratified the Additional Protocols. For Additional Protocol II to apply to situations of armed conflict of non-international nature the state on whose territory the armed conflict is taking place should have ratified it. The prerequisite of holding a part of the state's territory by the NSAG makes Additional Protocol II doubly difficult to adhere to. In fact, there are not many NSAGs around the globe that can satisfy this criterion. For example, there is no doubt that at the height of the conflict between the PKK and the Turkish army in the late 1980s and 1990s the intensity of conflict reached the threshold stipulated in Common Article 3 of the Geneva Conventions. Therefore, because of its customary status in international law both parties to the conflict were bound by Common Article 3. On the other hand, because of Turkey's non-ratification, Additional Protocol II did not apply to the conflict. In contrast, in relation to the on-going conflict involving the PKK and PJAK in Turkey and Iran respectively, the intensity of armed action does reach the level of internal armed conflict, therefore, the conflict would be regulated by international human rights law (IHRL) and Turkish and Iranian criminal justice systems.

In general, all of the Kurdish NSAGs claim that their armed struggle is the exercise of their right to self-determination. The right of people to self-determination is enshrined in international law by virtue of the UN Charter. The issue of exercising the right to self-determination is of great significance since according to Article 1(4) of the Protocol I the wars of liberation are now internationalized. If that is the case, combatants are no longer considered as terrorists as long as they comply with IHL and they are exercising their right to self-determination. Therefore, Protocol I decriminalizes acts that could have previously been considered as terrorism. Indeed, it is to the benefit of NSAGs in general to convince the international community that the on-going armed conflict is either internationalized or international in nature, and therefore IHL applies in its entirety. It is the finding of this study that the issue of the exercise of the right to self-determination and its resultant wars of national liberation do not apply to the Kurdish NSAGs engaged in conflicts against the sovereign states under consideration. This is in light of the fact that none of the states concerned are practicing colonial domination, or are alien occupiers or racist regimes.

Although the right to self-determination is established in international law and theory, it is argued that with the near ending of decolonization processes, the right to self-determination is no longer internationally supported. However, recent events in East Timor and Kosovo prove that the most important factor in achieving the right to self-determination is whether the people in question can garner the support of the international community and more importantly the permanent members of the UN Security Council by not making use of their veto right. This is the kind of support that the Kurds have never enjoyed.

Since the creation of the United Nations and the codification of international law, IHRL has had profound influence on international law in general and the laws of war in particular. The maxim of *hominum causa omne ius constitutum* (all law is created for the benefit of human beings) encapsulates the very *raison d'être* of IHRL and IHL. It was utilized by the ICTY in the *Tadic* Jurisdiction decision to indicate the influence of international human rights standards upon IHL. This approach is also backed by state practice highlighting the complementary and mutually reinforcing nature of IHRL and IHL. The framework of IHRL which has been analysed in this work applies at all times even in situations of armed conflict. However, should the circumstances amount to an armed conflict then the instruments of IHL can affect the interpretation and obligations of IHRL.

There is an undoubted convergence between IHRL and IHL in which IHRL acts as a gap-filler in those areas not regulated by IHL, particularly in the case of non-international armed conflicts. Although there is uncertainty regarding the relationship between IHL and IHRL, it is generally accepted that problems of application and interaction caused by overlapping of the two paradigms are decided by the maxim of *lex specialis*. It is widely believed that in times of armed conflict IHL is *Lex specialis* vis-à-vis IHRL. This maxim is best illustrated in situations of internal armed conflict in which one must apply the rule that provides the optimum level of protection for combatants and civilians alike.

The manifestation of the importance of IHRL is the role played by human rights organizations in contemporary armed conflicts particularly in relation to internal armed conflict. The pivotal role played by the UN Human Rights Council (UNHRC), the very guardian of promotion and protection of human rights globally, is of particular significance. In recent decades, the UNHRC has been active in promoting the protection of civilians in contemporary armed conflicts. Another organization of note is the European Court of Human

Rights which in recent years has been very active in interpretation and application of IHL to internal-armed conflicts including the conflict in southeast Turkey.

It is worth noting that human rights law has more advanced procedural safeguards for the protection of individual rights than humanitarian law, especially in regards to the right to an individual remedy. Since Turkey accepted in 1990 the jurisdiction of the European Court of Human Rights to hear individual claims, the European Court of Human Rights has found Turkey guilty of many violations of the European Convention on Human Rights (ECHR). The fact that Turkey is bound by the ECHR provides an effective remedy for its Kurdish populations to exploit beyond the domestic legal system. Of course, such a remedy is not available to the Kurds in Iran and Iraq since those states are not party to the ECHR, nor are they availed such legal recourse under public international law.

In recent years, the issue of terrorism has dominated the international political discourse. Yet, in condemning terrorism as unjustifiable, some states vehemently maintain that some violence in pursuit of just causes are justifiable and does not constitute terrorism. Even some developing states are of the opinion that in pursuit of a just cause all possible means are justified. The uncertainty in regards to the issue of terrorism stems mainly from inability of the international community to arrive at a universally accepted definition of terrorism. Whereas ‘inner core’ of terrorism, such as indiscriminate attacks upon civilians can never be justified, the ‘outer core’ of terrorism, such acts that would not be contrary to IHL if committed by state armed forces in armed conflict can be more susceptible to justification.

Prior to the PKK’s armed campaign against the Turkish state none of the Kurdish NSAGs in the three states under consideration resorted to urban terrorist tactics. This *modus operandi* is now favoured by many such NSAGs faced with much superior state armed forces. As a result, the blurring of the dividing line between armed conflict and other forms of violence highlights the difficulty of maintaining a distinction between terrorism and genuine armed conflict. Therefore, it has become a very difficult task to distinguish between what is justified violence and isolated terrorist acts. This issue was in sharp focus particularly in the aftermath of the terrorist attacks upon the World Trade Centre and the Pentagon on 11 September 2001 and its resultant ‘global war on terror’.

Where politician and the media refer to the ‘global war on terror’, this can be misleading since the term ‘war’ is used to emphasise the political importance of counter-terrorism, rather than referring to any specific international or non-international armed conflict. It is submitted that the use of criminal justice system to prevent terrorism is not a ‘war’ to which IHL applies. In reality, in the aftermath of the launch of ‘global war on terror’, states more readily brand any NSAG as terrorist regardless of their cause and legitimacy. The best example of this trend is that both the PKK and its Iranian affiliate PJAK are listed as proscribed organizations by the European Union, NATO and US State Department. It has to be acknowledged that the listing of these organizations took place in the aftermath of 11 September 2001 attacks mainly due to the political pressure from the US and its ally Turkey. It is the belief of the present author that if the international community is not to become complicit in repression of legitimate political resistance, a more coherent and comprehensive definition of terrorism by international community would go a long way to make a clear distinction between illegitimate violent terrorism and legitimate armed resistance.

The extraterritorial use of force by a state against a NSAG based in another state raises a number of legal issues. In recent years, both Turkey and Iran have launched attacks upon military bases allegedly belonging to the PKK and PJAK in northern Iraq. However, neither of the states in recent years has informed the UN Security Council a pre-requisite of article 51 of the UN Charter. This is quite a departure from previous practice by Iran. In fact, during the 1980s and 1990s, Iran expressly invoked self-defence under Article 51 of the UN Charter as a justification and regularly informed the UN Security Council of its armed reprisals against Kurdish NSAG based in northern Iran. In contrast, Turkey has never expressly invoked article 51 in relation to its operations in northern Iraq.

It has to be stated that the situation in northern Iraq is a very unique one. This is where the PKK and PJAK launch their attacks on the Turkish and Iranian territories. Turkey and Iran maintain that it is within their right to defend their respective territories from what they describe as terrorist attacks. In recent years, Turkey and Iran have stressed their determination to take measures to protect their legitimate security interest, defending their borders and protecting their citizens from attacks from the aforesaid NSAGs. The most significant aspect of these operations is that the international community has refrained from condemning Turkey and Iran for these actions which clearly violates the sovereignty of Iraq.

In fact, Turkey a member of NATO in many occasions has been supported by the US for its anti-terrorist operations against the PKK.

In general, according to international law it is illegal for a state to use force against another state even if the territory of the latter has been used by a NSAG to attack the former. Forcible use of force against another state violates the fundamental prohibition on use of force set out in Article 2(4) of the UN Charter. Unless, it could be established that the sending state has aided and abetted the NSAG in preparation and commissioning of the attack, the afflicted state cannot rely on the right to self-defence according to Article 51 of the UN Charter. This view is supported by a series of judgments handed down by the International Court of Justice (ICJ). However, the customary rules regarding the use of force against NSAG based in the territory of another state have developed in a different direction. The study has established that there is now an emerging international state practice that allows sovereign states to act in self-defence in response to attacks, even if these attacks are committed only by NSAGs particularly bases in another state.

The emergence of this process was very much in evidence in the aftermath of the Operation Enduring Freedom in 2001, especially in regard to the universal support it received from the international community. Therefore, it is safe to assume that in light of the state practice and *opinio juris*, there is extensive evidence that there is a clear tendency to allow states to act in self-defence in response to attacks instigated by a NSAG. This deduction does not mean that no connection has to be established between the state using force in self-defence and the state the NSAG is using as a hideout. This link according to recent state practice is required by the condition of the law of self-defence. It serves to demonstrate that the harbouring state is either unable or unwilling to stop the NSAG launching attacks upon the victim state. Therefore, it becomes a necessity for the victim state to take action in order to protect itself. Recent state practice also offers some indication regarding the level of gravity that an attack must reach to trigger the right of self-defence and the proportionality of the action in self-defence.

As discussed above, in recent years in countering the collective threat of the PKK and PJAK, Turkey and Iran have co-ordinated their military operations in northern Iraq. It is submitted that Iran's military action in northern Iraq violates the territorial integrity of Iraq and it is deemed as illegal. This conclusion is based on the fact that there has never been any armed

conflict between Iranian armed forces and PJAK (the PKK affiliate), nor has there been an accumulation of attacks upon the Iranian territory instigated by PJAK which could trigger the right of self-defence. In contrast, as previously established in the study, in regards to Turkey and the PKK there has been concentrated military activities between the aforesaid parties in southeast Turkey since early 1980s as well as constant accumulation of attacks by the PKK upon the Turkish territory in recent years on regular basis. Turkey in many occasions in the past has demanded cooperation from the Iraqi central government and the Kurdish Regional Government (KRG) to stop the PKK violation of Turkish territorial sovereignty. However, such cooperation has never been forthcoming either due to inability or in some case reluctance of the Iraqi government or KRG to intervene in such matters.

There is no question that in regards to the classical international law, the Turkish military interventions in northern Iraq since the start of hostilities with the PKK have violated the territorial integrity of Iraq. Nevertheless, this study has established that there is an on-going shift in customary practice which enables the attacked states to take proportionate military action against military bases belonging to the NSAG on the basis of the doctrine of necessity. It cannot be overstated that compliance with the necessity and proportionality criteria remains of pivotal importance. In regards to the gravity criterion, it confirms that even successive minor use of force, linked by the same aggressive intention may be accumulated and regarded as a single use of force.

The common denominator of any armed conflict is that they are fought by human beings who ultimately bear the brunt of such conflicts. What this study has argued for is that the confluence of customary law and treaty international law does create the groundwork for a more uniform application of IHL. According to the Nuremburg Tribunal, the laws that govern armed conflict 'are not static, but by continual adaptation follow the needs of a changing world.'²¹⁵³ The interpretation of IHL should be guided *inter alia* by its main object and purpose, the protection of victims of armed conflict. There are considerable policy arguments in favour of the approach that international law should no longer make the distinction between international and non-international armed conflicts. Furthermore, it is submitted that a uniform application of IHL would go a long way in completing the process of humanization of the law of war. There are considerable barriers to achieve this, the most significant being

²¹⁵³ Trial of Major War Criminals before the international Criminal Tribunal, Nuremburg, 14 November 1945-1 October 1946, vol. I, p. 221.

the status and treatment of participants under IHL. However, the biggest barrier to overcome is to convince sovereign states to adopt such an approach resulting in further compromise of their national sovereignty.

Recent developments in state practice and legal opinion signify the blurring of the distinction between international and non-international armed conflicts and the rules applicable to each, signifying a move away from a state-centred approach towards greater concern for the individual. The Appeal Chamber in the *Tadic* Decision on the Defence Motion for the Interlocutory Appeal on Jurisdiction stated that the distinction between international and non-international armed conflicts ‘was losing its value as far as human beings were concerned’.²¹⁵⁴ It is submitted that while international law can safeguard the legitimate interest of states, it should also concentrate its efforts on protection of those who are not taking part in the hostilities. There are factors that have contributed to the gradual blurring of the distinction between customary international rules governing international conflicts and those of internal conflicts. Unquestionably, two factors have contributed greatly to this important development in IHL, namely; the increase in number of civil conflicts globally and the universal influence of human rights standards.

It is submitted that as the case of the Kurdish microcosm clearly illustrates, for some time the international/non-international dichotomy in IHL has proved susceptible to political manipulation since no state would ever admit that an armed conflict exists on its territory. Even, during some of the bloodiest conflicts between the Kurds and their host states this recognition has never been forthcoming. Eradication of the aforesaid dichotomy and application of a single law of armed conflict will therefore be essential in providing greater humanitarian protection during internal armed conflict. This would require acquiescence and commitment on the part of sovereign states. Although reciprocity has been at the centre of the historical development of IHL, it is no longer the case, particularly in relation to internal armed conflicts. It is the humanization of the law regulating non-international armed conflict that serves to limit to great extent human sufferings. Although the concept of sovereignty in international law remains supreme, but it is undeniable that by doing so the international community would signal its willingness to add political will to human rights rhetoric.

²¹⁵⁴ *Prosecutor v. Tadic, op. cit.*, at para. 97.

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